DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 92 CV 7223, Courtroom 19

TRIAL BRIEF

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado,
GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

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TABLE OF CONTENTS

PAGE

INTRODUCTION 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

I. AMENDMENT 2 PROHIBITS ONLY STATE OR LOCAL SPECIAL LEGAL PROTECTIONS FOR HOMOSEXUALS AND BISEXUALS 4

II. AMENDMENT 2 IS NOT UNCONSTITUTIONALLY VAGUE . . 11

III. THE PLAINTIFFS' LOCAL GOVERNMENT AND OTHER STATE CONSTITUTIONAL LAW CLAIMS ARE WITHOUT MERIT . . 15

A. Amendment 2 Does Not Violate the Home Rule Provisions of the Colorado Constitution . . 16

B. Amendment 2 Does Not Violate the Constitutional Powers of Local School Districts . . 21

C. Amendment 2 Does Not Violate the Colorado Bill of Rights 23

IV. AMENDMENT 2 DOES NOT VIOLATE THE PLAINTIFFS' RIGHTS UNDER THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION 24

A. Amendment 2 Does Not Abridge the Right to Petition 25

B. Amendment 2 Does Not Abridge the Freedom of Expression 27

C. Amendment 2 Does Not Abridge the Freedom of Association 33

D. Amendment 2 Does Not Abridge the Establishment Clause 37

V. THE PLAINTIFFS ARE NOT MEMBERS OF A SUSPECT CLASS 43

VI. AMENDMENT 2 IS VALID AS AN EXERCISE OF THE PEOPLE'S RESERVED POWERS UNDER THE TENTH AMENDMENT 51

TABLE OF CONTENTS (continued)

PAGE

VII. AMENDMENT 2 ADVANCES SEVERAL RATIONAL AND COMPELLING STATE INTERESTS 55

A. Determining What Constitutes a Compelling Interest 57

B. Amendment 2 Serves to Deter Factionalism . . 59

C. Amendment 2 Preserves the Integrity of the State's Political Functions 61

D. Amendment 2 Preserves the Ability of the State to Remedy Discrimination Against Suspect Classes 64

E. Amendment 2 Prevents Government from Subsidizing the Political Objectives of a Special Interest Group 68

F. Amendment 2 Prevents Government From Interfering With Personal, Familial, and Religious Privacy 69

G. Amendment 2 Promotes the Physical and Psychological Well-Being of Our Children . . 73

H. Taken Together, These Interests Constitute a Compelling Interest Which Validates Amendment 2 76

VIII. AMENDMENT 2 IS NARROWLY TAILORED 76

CONCLUSION 78

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Plaintiffs,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants.

The Defendants Roy Romer, Governor of the State of Colorado, Gale A. Norton, Attorney General of the State of Colorado, and the State of Colorado submit the following trial brief for the consideration of the court.

INTRODUCTION

On November 3, 1992, the people of Colorado adopted "Amendment 2," which provides:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of

> persons to have any claim of minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Colo. Const. art. II, § 30b.

On January 15, 1993 this court preliminarily enjoined Petitioners Romer and Norton from enforcing Amendment 2, and on July 19, 1993, the Colorado Supreme Court affirmed that order, albeit on somewhat different grounds. Evans v. Romer, 854 P.2d 1270, 1286 (Colo. 1993). The tasks before the court at this time are: to ascertain the meaning of Amendment 2; to gauge its purported effect upon the Plaintiffs' due process, local government, First Amendment and equal protection interests; and finally, to determine whether, in any event, the State can demonstrate that Amendment is supported by a compelling interest.[1]

SUMMARY OF THE ARGUMENT

1. Amendment 2 invalidates existing, and prohibits future, state and local laws and policies providing special legal protections for homosexuals and bisexuals. It does not prevent

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[1]Under the ruling of the Colorado Supreme Court, the State must show that Amendment 2 is supported by a compelling interest with respect to the infringement of the individual Plaintiffs' right to equally participate in the poltical process. The Colorado Supreme Court imposed this burden upon the State only as to Amendment 2's effect upon orientation, and declined to further define the scope of the amendment. Evans v. Romer, 854 P.2d 1270, 1284 n.25 (Colo. 1993). The Court made no determination as to Amendment 2's constitutionality with respect to homosexual or bisexual "conduct, practices or relationships."

Colorado courts from adjudicating claims of discrimination grounded in federal law.

2. Amendment 2 is sufficiently clear, unambiguous, and otherwise understandable to withstand a vagueness challenge.

3. The Plaintiffs cannot prevail on their local government or other state constitutional claims because Amendment 2, as part of the constitution, cannot be said to violate any other part of the constitution.

4. Amendment 2 violates no rights protected by the First Amendment to the U.S. Constitution.

5. The Plaintiffs cannot show, as a matter of law, that they are members of a suspect class, entitled to strict scrutiny review under the Equal protection Clause. Even if the Plaintiffs have properly pled they are a suspect class, they do not meet the criteria. Furthermore, federal cases preclude a finding of suspect class status as a matter of law.

6. In any event Amendment 2 withstands attack as a valid exercise of the people's reserved powers under the Tenth Amendment.

7. Amendment 2 advances several rational and compelling state interests, including deterring factionalism; preserving the integrity of the State's political functions; preserving the ability of the State to remedy discrimination against suspect classes; preventing the government from interfering with personal, familial, and religious privacy; preventing government from subsidizing the political objectives of a special interest group; and promoting the physical and psychological well-being of our

children. Even if individually these interests are found to be inadequate, taken together they are nonetheless compelling.

8. Amendment 2 is narrowly tailored because, rather than a broad measure imposing special burdens upon homosexual and bisexuals, it denies protections solely on the basis upon which they have been sought. It also imposes an exceptionally minor burden upon the "right" to participate equally in the political process because there is absolutely no other way that the people could further the common elements of the various compelling interests, but through the enactment of Amendment 2.

ARGUMENT

I. AMENDMENT 2 PROHIBITS ONLY STATE OR LOCAL SPECIAL LEGAL PROTECTIONS FOR HOMOSEXUALS AND BISEXUALS

This court must find that Amendment 2 is susceptible of no possible constitutional interpretation or application, beyond a reasonable doubt.[2] The court is further obligated to presume the amendment's constitutionality,[3] and to further construe it in such a manner as to avoid any possible constitutional infirmity.[4]

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[2]People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989).

[3]Id. Cf. People v. Stevens, 761 P.2d 768, 771 (Colo. 1988) (even a provision "that fails to set precise standards . . . may be given a constitutional interpretation that accomplishes the purposes for which [it] was enacted.")

[4]People in the Matter of R.M.D., 829 P.2d 852, 853 (Colo. 1992). Accord, People v. Rosburg, 805 P.2d 432, 439 (Colo. 1991) ("the court has a duty to construe the statute in such a way that it is not void for vagueness when a reasonable and practicable construction can be given to its language"); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1974)("a state statute should not

Amendment 2 neither affirmatively authorizes, encourages, nor establishes discrimination based upon sexual orientation, nor bars homosexuals and bisexuals from having federal discrimination suits adjudicated in state court. Rather, it simply limits the grounds upon which relief may be granted in state court to those cognizable under federal law. Amendment 2: (1) prohibits state and local governmental entities; (2) from enacting, adopting, or enforcing any statute, regulation, ordinance or policy; (3) recognizing a claim (and the concomitant benefits) of minority status, quota preferences, protected status, or discrimination; (4) premised on homosexual or bisexual orientation, conduct, practices, or relationships.

Amendment 2's prohibition on the enactment or adoption of state or local laws or policies according "minority status," "quota preferences," and "protected status," premised on homosexual or bisexual "orientation, conduct, practices or relationships" is readily understandable. The terms "minority status," "quota preferences," and "protected status," are commonly used in the federal civil rights context to refer to those classes of individuals for whom special consideration, treatment, or protection is given.[5] And, the phrase "orientation, conduct, practices or

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be deemed facially invalid unless it is not readily subject to a narrowing construction by the state court . . . .")

[5]E.g., Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1549 (5th Cir. 1992)(word "minority" used in civil rights cases to denote a racial or social group, not a numerical percentage); Penthouse International, Ltd. v. Meese, 939 F.2d 1011, 1017 (D.C. Cir. 1991)("minority status"); H.K. Porter Co., Inc. v. Metropolitan Dade County, 975 F.2d 762, 766 (11th Cir. 1992)(use of

relationships" is easily understood as referring to inclinations, acts, or romantic or passionate attachments.[6]

The Plaintiffs eschew the reasonable and fair constitutional interpretation ascribed to Amendment 2 by the Defendants, in favor of a parade of horribles having no foundation in fact. It is absurd to suggest, as Plaintiffs do, that Amendment 2 leaves homosexuals and bisexuals wholly defenseless against those who would discriminate against them, or prohibits the state judiciary from adjudicating "claims of discrimination" which could otherwise have been brought by those individuals under federal law.

Where the intended extent of a constitutional inhibition is uncertain, the limit of the purpose marks the limit of the rule, Lancaster v. Board of Comm'rs of Jefferson County, 115 Colo. 261, 265, 171 P.2d 987, 989 (1946). In determining the purpose of the amendment, the state of things existing when the amendment was adopted should be looked at, cf. Krutka v. Spinuzzi, 153 Colo. 115, 123, 384 P.2d 928, 933 (1963)(original constitution), and the object to be accomplished and the mischief to be avoided as a result of the amendment should be considered. People v. Y.D.M., 197 Colo. 403, 407, 593 P.2d 1356, 1359 (1979). In this respect, our state legislative council's analysis of the amendment provides important insight into the electorate's understanding of the

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"quotas" to alleviate effects of past discrimination); Ortega v. Safeway Stores, Inc., 943 F.2d 1230, 1236 (10th Cir. 1991)("protected status").

[6]See discussion of vagueness, pp. 11-15, infra.

amendment when it passed. Carrera Place, Ltd. v. Arapahoe County Bd. of Equalization, 761 P.2d 197, 203 (Colo. 1988).[7]

Viewed under these principles, the meaning and reach of Amendment 2 is clear. At the time the amendment was proposed (as well as currently), federal case and statutory law identified several groups or classes of individuals as appropriate for "special protection" against discrimination. Generally speaking, individuals are protected under the Fourteenth Amendment's Equal Protection Clause only from arbitrary governmental discrimination, and not at all as to private discrimination. The United States Supreme Court has, however, identified a very few number of classes of individuals which are entitled to heightened protection from possible governmental discrimination,[8] and Congress has enacted

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[7]The Legislative Council's analysis of Amendment 2 was introduced into evidence at the preliminary injunction hearing as part of the Defendants' Exhibit "C". For the convenience of the court it is attached to this brief.

[8]Loving v. Virginia, 388 U.S. 1, 11 (1967)(racial status, suspect class); Korematsu v. United States, 323 U.S. 214, 216 (1944)(national ancestry and ethnic origin, suspect class); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 723-24 (1982) (gender, quasi-suspect class); and Lalli v. Lalli, 439 U.S. 259, 265 (1978) (illegitimacy, quasi-suspect class).

Alienage is not a true suspect classification, but is subject to strict scrutiny in certain circumstances. Although the federal government may not discriminate invidiously against aliens, Mathews v. Diaz, 426 U.S. 67, 77 (1976), because of its plenary power over foreign relations and immigration, its classifications in this regard are typically subject only to rational basis review. Many distinctions validly made by Congress in thsi regard would be unconstitutional if made by States. Id. at 78-84. In contrast, state enactments are typically subjected to strict scrutiny, Graham v. Richardson, 403 U.S. 365 (1971), although even here the U.S. Supreme Court has recognized a "political function" exception justifying exclusion of aliens from voting and holding public office. Sugarman v. Dougall, 413 U.S. 634 (1973). Cf. Gregory v.

legislation protecting these same classes -- as well as a few more -- from public and private discrimination.[9] Homosexual or bisexual orientation has never been identified by the federal appellate courts or Congress as a basis for providing any special treatment beyond that guaranteed to most individuals under the Equal Protection Clause.

This was not true in Colorado, however. At the time Amendment 2 was proposed, the General Assembly had enacted a statute prohibiting health insurance companies from determining insurability based on one's sexual orientation; the Governor had issued an executive order prohibiting job discrimination for state classified employees based on sexual orientation; at least two state colleges had policies prohibiting discrimination based on sexual orientation; three home rule cities (Denver, Boulder, and Aspen) had ordinances prohibiting discrimination based on sexual orientation in jobs, housing, and public accommodations; and the Colorado Civil Rights Commission had voted to recommend that the General Assembly extend the State's civil rights act to ban discrimination based upon sexual orientation. Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals, Research Publ. No. 369 (1992) at 10. These "sexual orientation" anti-discrimination provisions were obviously meant to protect homosexu-

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Ashcroft, 111 S. Ct. 2395 (1991).

[9]E.g., 20 U.S.C. § 1681 (sex); 29 U.S.C. §§ 206 (sex), 621 (age), 701 (handicapped); 42 U.S.C. §§ 1981 (race), 1982 (age), 2000d (race, color, national origin), 2000e (race, sex, religion, national origin).

als and bisexuals, since heterosexuals had not been subjected to any significant amount or type of private or public discrimination.

As Amendment 2's legislative history makes clear, its backers were concerned with only two things: 1) nullifying the effect of existing state and local laws or policies which prohibited discrimination based on homosexual or bisexual orientation; and 2) ensuring that state and local authorities could not adopt laws or policies which would have this effect. An Analysis of 1992 Ballot Proposals at 10-11.[10] Properly analyzed, the guiding intent behind Amendment 2 was not to deprive homosexuals or bisexuals of any federally guaranteed rights, but to remove any state-based grounds for more favorable treatment than that accorded other citizens. Simply put, the intent was to realign the rights of the citizenry of this State with those provided by federal law and generally recognized throughout the rest of the country.[11]

Having this in mind, and recognizing the constitutional supremacy problem created when a state court cannot entertain a

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[10]Amendment 2 was not understood as intended to drive homosexuals or bisexuals from society. Where appropriate, homosexuals and bisexuals would have recourse to tort laws, Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals, Research Publ. No. 369 (1992) at 11, and neither the Amendment's language nor legislative history purport to make inapplicable to homosexuals or bisexuals the general protections of property, contract, employment, or criminal law.

[11]Nationwide, only six States, eight other governors, 110 cities and counties in 25 States, and 65 universities had adopted anti-discrimination laws or policies with respect to sexual orientation. An Analysis of 1992 Ballot Proposals at 10. Since Amendment 2 was proposed, at least two more States, and five more governors had adopted similar provisions. National Gay and Lesbian Task Force, Lesbian and Gay Civil Rights in the United States (Feb. 1993); Minn. Stat. § 363.01, et seq. (1993).

federal cause of action, e.g. Howlett by and through Howlett v. Rose, 496 U.S. 356, 369-71 (1990), the amendment prohibits only the enforcement of state or locally based claims of discrimination. Amendment 2 neither was intended to nor in fact does deny Colorado courts the power to adjudicate federally-based claims premised upon a plaintiff's sexual orientation.[12] This interpretation, which is also consistent with the principle of ejusdem generis, see Colorado Common Cause v. Meyer, 758 P.2d 153, 162 (Colo. 1988), accomplishes the underlying purpose of the amendment. See, e.g., Parrish v. Lamm, 758 P.2d 1356, 1369 (Colo. 1988)(court accomplishes legislative purpose, and avoids constitutional issue, by construing word "determines" to mean "reasonably determines").[13] Consequently, the Plaintiffs' claims in this regard, including that relating to the Supremacy Clause of the U.S. Constitution, are wholly without merit.

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[12]For the same reasons, Plaintiffs' claim that Amendment 2 unconstitutionally denies access to the courts is also without merit. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)(quoting Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc, 365 U.S. 127, 138 (1961). See also N.A.A.C.P. v. Button, 371 U.S. 415, 429-30 (1963); Protect Our Mountain v. District Court, 677 P.2d 1361, 1365 (Colo. 1984). It also has been noted that the right to petition may be given less weight when adjudicatory bodies are sought to be petitioned, rather than state or federal legislatures. In re Airport Car Rental Antitrust Litigation, 474 F. Supp. 1072, 1087 (N.D. Cal. 1979).

[13]The Plaintiffs complain that this construction is "strained" and contrary to "plain language." However, it is the Plaintiffs who ignore the "plain language" of the amendment's title and certain phrases indicating that its purpose was only to prohibit special rights. At most there is a possible ambiguity in the language, which must be resolved in favor of the Defendants, after resorting to the appropriate legislative history.

II. AMENDMENT 2 IS NOT UNCONSTITUTIONALLY VAGUE

Plaintiffs claim that Amendment 2 is impermissibly vague under the Due Process Clause of the Fourteenth Amendment. In Plaintiffs' view, Amendment 2's lack of definitions or limitations on its sweep renders it impermissibly imprecise and open to subjective, arbitrary, and viewpoint-based enforcement, particularly regarding First Amendment freedoms. For several reasons, Plaintiffs' claims must fail.

First, the void-for-vagueness doctrine is actuated primarily by the imposition of sanctions upon affected persons. The policy underlying the doctrine is the fundamental unfairness of penalizing individuals who had no reason to believe their conduct was forbidden.[14] Here, there are no "sanctions" imposed upon "persons." Amendment 2 does not impose any direct obligations or disabilities upon private parties, including the individual named Plaintiffs; it simply limits certain kinds of governmental conduct, and the affected governmental entities are not "persons" entitled to the protections of the Due Process Clause. See, e.g., Board of County Comm'rs v. City and County of Denver, 150 Colo. 198, 372 P.2d 152, 156 (1962).

Second, the void-for-vagueness doctrine is particularly inappropriate for gauging the validity of constitutional provi-

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[14]See, e.g., Sellon v. City of Manitou Springs, 745 P.2d 229, 233 (Colo. 1987)(in order to succeed on a vagueness challenge, the provision must fail to provide fair notice of what conduct is prohibited, or fail to provide law enforcement authorities with sufficiently definite standards of nonarbitrary, nondiscriminatory enforcement of the law.").

sions, which, because of their very nature, are expected to have a fairly broad, rather than specific, meaning. For example, despite all the questions which have arisen over the past century about what constitutes "religion," "a preference," of or for religion, or "the free exercise and enjoyment of religious profession and worship," no would suggest that the Religion Clauses of the Colorado Constitution, art. II, § 4, are facially invalid under the vagueness doctrine of the federal constitution. For that matter, the notion of due process, upon which the vagueness doctrine is founded, is itself "an elusive concept," whose "exact boundaries are undefinable, and its content varies according to specific factual contexts." Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990).

Finally, Amendment 2 would not, in any event, violate the vagueness doctrine of the Due Process Clause. Plaintiffs cannot argue that the amendment is impermissibly imprecise in all its possible applications, as they must whenever a challenged provision does not on its face implicate First Amendment rights. See Village of Hoffman, Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-99 (1982). Even assuming there is any ambiguity which could be viewed as implicating First Amendment freedoms, Amendment 2 is nonetheless sufficiently precise to withstand a challenge

premised upon the attending heightened scrutiny.[15] See generally United States v. Young, 864 F.2d 188, 194 (D.C. Cir. 1988).

"The vagueness test 'is not an exercise in semantics to emasculate legislation; rather, it is a pragmatic test to ensure fairness.'" Parrish v. Lamm, 758 P.2d at 1368. An enactment will not, then, be held impermissibly vague simply because legitimate differences of opinion could exist as to the meaning or application of words. Hejira Corp. v. McFarlane, 660 F.2d 1356, 1362 (10th Cir. 1981). Accord People v. Allen, 657 P.2d 447, 451 (Colo. 1983). "Due process of law requires neither scientific nor mathematical exactitude in legislative draftsmanship." Sellon, 745 P.2d at 233. Accord People v. Ford, 773 P.2d 1059, 1067 (Colo. 1989). See also Young, 864 F.2d 188 at 195.

Most of Amendment 2 is, on its face, readily understandable if the court looks to the natural and popular meaning of words. See A-B Cattle Co. v. United States, 196 Colo. 539, 545, 589 P.2d 57, 61 (1979). On July 16, 1993, this court refused to dismiss the Plaintiffs' vagueness claim because of the issue regarding the meaning of the term "orientation," as used in Amendment 2. However, the Plaintiffs themselves are intimately familiar with the term "orientation" as used in the context of "sexual,"

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[15]"The degree of vagueness the Constitution tolerates . . . depends in part on the nature of the enactment." Village of Hoffman, Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). The Constitution demands greater clarity in criminal enactments and in enactments threatening to inhibit the exercise of constitutionally protected rights; it requires less clarity in civil enactments and economic regulations. Flipside, 455 U.S. at 498-99; Parrish v. Lamm, 758 P.2d 1356, 1366-67 (Colo. 1988); High Gear & Toke Shop, 689 P.2d 624, 631 (Colo. 1984).

"homosexual," and "heterosxual" orientation. They have themselves, after all, used this term in both seeking and establishing special legal protections on this basis.

Indeed, their own witness, Dr. Gonsiorek, testified at the preliminary injunction hearing that: "Sexual orientation is generally viewed as an erotic or emotional preference for the same or opposite gender or both. It is usually differentiated from other aspects of sexual identity so that one's biological sex, one's chromosonal sex, is considered to be a a different variable. Tr. at 80 (Jan. 11, 1993).

Similarly, courts have had no trouble recognizing that "Individuals whose sexual orientation creates in them a desire for sexual relationships with persons of the same sex have a homosexual orientation," Watkins v. United States, 875 F.2d 699, 712 n.3 (9th Cir. 1989)(Norris, J., concurring), or that a "homosexual orientation" refers "to one's status as a homosexual, one's exual preference, or one's desire for sexual gratification from those of the same gender." Steffan v. Cheney, 780 F. Supp. 1, 2 n.1 (D. D.C. 1991). This meaning tracks very closely with that provided in Amendment 2's legislative history, which defines "sexual orientation" as "the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality." An Analysis of 1992 Ballot Proposals at 9.[16]

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[16]"Orientation" is synonymous with "preference," see Opinion of the Justices to the Senate, 390 Mass. 1201, 458 N.E.2d 1192, 1194 (1984)("sexual preference" is not vague, because it is synonymous with "sexual orientation"); "conduct" and "practices," refer, respectively, to "mode of action" and "customs," Black's Law

In light of the legislative history, the Plaintiffs' own acknowledged understanding, and its use in case law, it cannot seriously be argued that the term "orientation" is, or otherwise makes Amendment 2 to be, unconstitutionally vague.

III. THE PLAINTIFFS' LOCAL GOVERNMENT AND OTHER STATE CONSTITUTIONAL LAW CLAIMS ARE WITHOUT MERIT

The Plaintiffs allege several types of violations of state constitutional law principles. They assert violations of state home rule and school district authority, and Bill of Rights principles; that is, they claim that a provision of the state constitution violates the state constitution. However, as part of the state constitution, Amendment 2 is equal in stature to the home rule, school district, and Bill of Rights provisions, and, being later in time and more specific, would control any inconsistencies in their application. See generally Colorado Common Cause v. Bledsoe, 810 P.2d 201, 207 (Colo. 1991).[17] It is patently nonsensical to speak of the constitution as violating itself.

Dictionary 295, 1172 (6th ed. 1990); and "relationships" refers to "the relation[s] connecting or binding participants in . . . relationship[s] . . . romantic or passionate attachment[s]," Webster's Ninth New College Dictionary 994.

[17]See also In re Interrogatories by General Assembly, House Joint Resolution 1108, Second Regular Session, Forty-Seventh General Assembly, 171 Colo. 200, 205, 467 P.2d 56, 59 (1970); People ex rel. Carlson v. City Council of the City and County of Denver, 60 Colo. 370, 380, 153 P. 690, 693 (1915).

A. Amendment 2 Does Not Violate the Home Rule Provisions of the Colorado Constitution

Amendment 2 and home rule authority do not and cannot conflict. The people have the power to declare matters to be of statewide concern, and thereby remove them from the authority of home rule cities. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). And, as the Court held in People ex rel. Carlson v. City Council of the City and County of Denver, 60 Colo. 370, 380, 153 P. 690, 693 (1915), it is not necessary that a constitutional amendment contain an express provision indicating it is specifically modifying Article XX.

Here, there can be no question about the statewide concern addressed by Amendment 2. Even aside from the fact that the exercise of the people's will, through the initiative process, inherently affects a matter of statewide concern, this court must recognize that questions of civil rights and discrimination cannot be relegated to a status of purely local concern. Congress and the States have often decided whether, as a matter of policy, the number of groups in need of protection should be expanded.

The Plaintiffs maintain that neither the text nor legislative history of Amendment 2 indicate any intention to override home rule powers. The claim that rather than preempting home rule power, Amendment 2 only removed whatever statutory authority Denver, Boulder, and Aspen may have had with respect to the issue. This argument is premised upon the amendment's lack of an explicit reference to either "home rule" municipalities, or "charters." The

Plaintiffs would have this court read into the amendment language of limitation which are not there, in order to frustrate the clear intent of the people as reflected in the legislative history.

Amendment 2 explictly refers to "municipalities," contains no terms of qualification or limitation, and draws no distinction between statutory or home rule cities. The Plaintiffs' attempt to buttress their argument by noting that the ballot title mentions only "political subdivisions" is, at best, tenuous. Similarly, their reliance on select language from Mesa Verde Co. v. Montezuma County, 831 P.2d 482, 485 (Colo. 1992) -- a standing case -- is misplaced,[18] and flies in the face of the long-recognized rule that home rule powers are subordinate to those of the State in matters of exclusively statewide or mixed state-local concerns. Poudre Valley Rural Elec. Ass'n, Inc. v. City of Loveland, 807 P.2d 547 (Colo. 1991). In any event, the legislative history makes clear that the amendment's "political subdivision" reference was intended to include municipalities. An Analysis of 1992 Ballot Proposals at 9.

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[18]The court intended to reaffirm Denver Urban Renewal Auth. v. Byrne, 618 P.2d 1374 (Colo. 1980), even though Byrne does not, in fact stand for the propsition stated. In addition, such a conclusion is not in keeping with long-standing Colorado case law. See, e.g., City of Boulder v. Regents of Univ. of Colorado, 179 Colo. 420, 501 P.2d 123, 126 (1972)("Even with all the powers granted home rule cities under Colo. const. art. XX, § 6, a home rule city is still a subdivision of the state"); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441, 445 (1958)("Clearly, our federal system does not encourage as a part thereof city-states. It therefore follows that home rule cities can be only an arm or branch of the state with delegated power.") See also City & County of Denver v. Board of County Commiss'rs, 760 P.2d 656, 662 (Colo. App. 1988), aff'd, 782 P.2d 753 (Colo. 1989).

This conclusion is not altered simply because the amendment does not refer to "charters,"[19] which are made, or amended, by a vote of the people.[20] The distinguishing characteristic of a home rule city is not that it is governed through a charter, but rather that it has plenary authority, insulated from the General Assembly, to govern matters of purely local concern. However, on matters of statewide concern, even general statutes supersede both conflicting local charter provisions and ordinances of home rule cities. City of Colorado Springs v. Industrial Comm'n, 749 P.2d 412, 416 (Colo. 1988).

To the extent that there is any ambiguity about the reach of Amendment 2, it is easily resolved by looking at its legislative history. As the testimony of the sponsors will demonstrate, the very purpose of using a constitutional amendment, as opposed to an initiated statute, was to overcome any claim of superior constitutional authority in home rule cities. Furthermore, that the people knew Amendment 2 was squarely aimed at the authority of home rule cities is clear from the discussion of "Current Laws and

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[19]The Plaintiffs believe the fact Amendment 1 uses the word "charter," and Amendment 2 does not, indicates the people's intent to create a exception for home rule cities. Not only were the amendments authored and sponsored by entirely different people, they also substantively have nothing to do with one another.

[20]Remarkably, the Plaintiffs at once condemn democracy at the statewide level, while maintaining it is of paramount importance at the local level. What they do not explain is how it is that an action which disadvantages identifiable groups locally, is valid as an exercise of popular self-government, yet becomes a violation of the Constitution when implemented statewide. Cf. Hunter v. Erickson, 393 U.S. 385 (1969); Evans v. Romer, 854 P.2d 1270 (Colo. 1993).

Policies," and "Impact of the Proposal," in the legislative history. In the first instance, the ordinances of "[t]hree home rule cities -- Aspen, Boulder, and Denver" are discussed at great length. Second, Amendment 2 is described as making:

> unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore, the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the Cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would . . . prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation.

An Analysis of 1992 Ballot Proposals at 10-11.

The supporters of Amendment 2 fully understood they were overriding home rule powers. This is made clear by the discussion of home rule cities and the argument that civil rights issues can -- and ought to be -- decided on a statewide, rather than on solely a municipal, level. Id. at 11. The opponents of the amendment were wholly cognizant of this as well, as reflected in their argument that "[t]he amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights." Id. at 12. Given the backdrop against which Amendment 2 was proposed and its legislative history, it cannot seriously be maintained that it was not intended to affect the powers of home rule cities.

Moreover, the Plaintiffs further argue that Colo. Const. art. XX (enacted in 1902) concerning home rule authority, operates as an

implied limitation on Colo. Const. art. V (enacted in 1876) concerning the power to initiate amendments to the Constitution. Amended Complaint, ¶ 60. Initially, such a claim must be premised upon an inherent conflict between Articles XX and V.

The test for the existence of a conflict between two constitutional provisions is whether one authorizes what the other forbids or forbids what the other authorizes. In Re Interrogatories Propounded by the Senate Concerning House Bill 1078, 189 Colo. 1, 7, 536 P.2d 308, 313 (1975). Nothing in the art. V power of initiative forbids what the art. XX home rule power permits. Furthermore, the Constitution must be liberally construed so as not to unduly limit or curtail the initiative rights of the people. In Re Second Initiated Constitutional Amendment Respecting Rights of Public to Uninterrupted Service by Public Employees of 1980, 200 Colo. 141, 146, 613 P.2d 867, 870 (1980). Even so, this case does not involve a conflict between two constitutional provisions, but rather, an alleged conflict between an amendment adopted under art. V and ordinances enacted under city charters adopted pursuant to art. XX. The Plaintiffs' arguments misapprehend the issue before the Court.

Moreover, the Colorado Supreme Court has held that:

> This court has long recognized that even in fields of local and municipal matters, the authority granted to home rule cities by Article XX may be taken away by subsequent amendments to the Constitution. . . . We recognize that the people have not surrendered their right to amend the constitution in any manner in which they see fit, and such amendments are always valid unless repugnant to the Constitution of the United States.

City and County of Denver v. Sweet, 138 Colo. at 49, 329 P.2d at 445 (citations omitted).

Under the Plaintiffs' reasoning, any constitutional provision adopted after 1902 which limits the power of home rule cities would be void. Such an interpretation of arts. V and XX is absurd and should be rejected by this Court. Mahood v. City and County of Denver, 118 Colo. 338, 340, 195 P.2d 379, 380 (1948).

B. Amendment 2 Does Not Violate the Constitutional Powers of Local School Districts

The Plaintiff Boulder Valley School District then asserts that, on its face, Amendment 2 violates Article IX, § 15 of the Colorado Constitution by nullifying certain of its policies with respect to sexual orientation.[21] In so doing, they assume that (1) Article IX, § 15 guarantees local control of all aspects of the schools; (2) local school districts have the power to adopt policies with respect to the sexual orientation of students; and (3) anything which conflicts with local control violates the Colorado Constitution. The Plaintiffs are incorrect as to each assumption.

First, the Plaintiffs completely misapprehend the nature of article IX, § 15. It does not guarantee local control over all aspects of the school district. Rather, article IX, § 15 simply

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[21]It must be noted that as a governmental entity, the School District must always have a rational basis for any action it takes with respect to its students. In this context, it is far from clear that Amendment 2 invalidates the School District's policy.

mandates that the local school board shall have control over instruction.[22] Policies related to the sexual orientation of students simply cannotbe said to be instructional.[23] In non-instructional areas such as policy making with respect to students, the school districts have only those powers specifically delegated by statute and, more importantly, clearly are subject to state control. E.g., Union High School Dist. v. Paul, 105 Colo. 93, 95 P.2d 5 (1939); Jacobs v. Freemon RE-1 School Dist., 697 P.2d 414 (Colo. App. 1984). Indeed, school districts are "merely the instruments of state government, chosen for the purpose of effectuating its policy in relation to schools." Hazlet v. Gaunt, 126 Colo. 385, 392, 250 P.2d 188, 191 (1952).

Second, since the Constitution does not give local districts the power to control non-instructional activities, the power to make policies with respect to the sexual orientation of students, if it exists at all, must come from those statutory provisions, §§ 22-32-109 and 110, C.R.S. (1988) which describe the specific duties and powers of school districts. Even assuming that these statutes confer a power to make policy with respect to sexual orientation of students, they are of course subject to the Constitution.

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[22]Indeed, the local board does not have total control over instruction. For example, school districts must teach United States and Colorado history, respect for the flag, the United States Constitution, and the effect and use of certain substances. See Sections 22-1-104, 106, 108, 110, C.R.S. (1988).

[23]Instructional subjects must relate in some fashion to curriculum taught in the classroom. It does not include any matter which may be considered or acted upon by the local school board.

Third, even if the sexual orientation policies can somehow be construed to be instructional, the school district cannot pursue this course of action without violating the constitutional rights of the students by forcing a particular value on them. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)(value of patriotism could not be forced on children). See also 1 W. Valente, Education Law: Public & Private § 11.12, 11.15, 11.16 (1985)(dealing with patriotism, evolution, and sex education). By providing claims of discrimination based on sexual orientation, a school board is endorsing the viewpoint that homosexuality is on the same footing as traditional heterosexuality. Cf. Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968)(both holding that school districts could not impose a particular viewpoint about the origins of humanity).

Most obviously, even if the policies at issue are somehow found to be instructional, Amendment 2 does not violate article IX, § 15. As noted earlier, if there is a conflict between two constitutional provisions, that which is more specific and later in time (Amendment 2) would control. Accordingly, the Plaintiffs' groundless claim of a violation of article IX, § 15 must fail.

C. Amendment 2 Does Not Violate the Colorado Bill of Rights

Finally, the Plaintiffs claim that Amendment 2 violates the Colorado Bill of Rights, of which it is now a part.[24] Even if the

[24]Plaintiffs specifically rely on provisions relating to the freedoms of association and expression (Colo. Const. art. II, § 10), the prohibition of an establishment of religion (Colo. Const.

Colorado Supreme Court had previously used some of these provisions to provide Colorado citizens more rights than required by federal law, as noted earlier such standards could not be applied to invalidate or limit the effect of Amendment 2. Simply put, "[t]he people can do any thing by constitutional amendment unless prohibited by the terms of the Constitution of the United States." Cooper Motors, Inc. v. Board of County Comm'rs, 131 Colo. 78, 84, 279 P.2d 685, 688 (1955).[25]

IV. AMENDMENT 2 DOES NOT VIOLATE THE PLAINTIFFS' RIGHTS UNDER THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION

The Plaintiffs lodge a number of related First Amendment claims. Specifically, they maintain that Amendment 2 violates the rights to petition, expression, and association, even though the First Amendment does not require that legislative, executive, and judicial bodies be allowed to act with respect to every conceivable viewpoint.

Both the United States and Colorado Constitutions contain numerous provisions which prevent government from acting on

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art. II, § 4), the right to access the courts (Colo. Const. art. II, § 6), and the right to equal protection of the law (Colo. Const. art. II § 25). Plaintiffs also argue that the right to petition is independently protected by Colo. Const. art. II, § 10. Amended Complaint at ¶ 47. However, Colo. Const. art. II, § 10 concerns the freedom of speech and of the press, does not reference the right to petition, and has not been held to encompass that right. Compare Colo. Const. art. II, § 24.

[25]Claims that Amendment 2 effectively voids the Colorado Bill of Rights as to homosexuals and bisexuals have no basis in the text or history of the amendment, and emerge solely from the extraordinarily broad construction sought by the Plaintiffs.

particular beliefs and none of these restrictions has ever been found to be a violation of the First Amendment rights of persons holding those particular beliefs. For example, the federal and state Equal Protection Clauses prevent state and local governments from acting on the belief that one race or one sex is superior to another. See U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 29. Yet, no one claims that these restrictions violate the First Amendment rights of white supremacist groups. Similarly, there are provisions prohibiting federal, state, and local governments from acting on the belief that one religion is superior or that certain religious practices should be condemned. See U.S. Const. amend. I; Colo. Const. art. II, § 4. See also U.S. Const. art. VI, § 3. However, no one claims that these restrictions violate the First Amendment rights of those who regard their religion as the one true church or who regard the religious practices of others as heresy.

A. Amendment 2 Does Not Abridge the Right to Petition

The Plaintiffs claim that since Amendment 2 places special protections for homosexuals and bisexuals beyond the competency of governmental officials, it abridges their right to petition the government for a redress of grievances.[26] However, "neither the First Amendment nor elsewhere in the Constitution is there a provision guaranteeing that all petitions for the redress of grievances will meet with success." Canfora v. Olds, 562 F.2d 363,

[26]"Congress shall make no law . . . abridging . . .the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.

364 (6th Cir. 1977).[27] Indeed, the right to petition government does not encompass any right to require a particular governmental entity to entertain matters which are beyond its authority to address. See generally, Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986). See also Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979)(The First Amendment "provides no guarantee that a speech will persuade or advocacy will be effective, nor does it 'impose any affirmative obligation on the government to listen or to respond . . . .'") Accord, Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 288 (1984)("A person's right to speak is not infringed when government simply ignores that person while listening to others.")

Moreover, "[w]hen government makes general policy, it is under no greater constitutional obligation to listen to any specially affected class than it is to listen to the public at large." Minnesota State Bd. for Community Colleges, 465 U.S. at 287. In fact, the Constitution does not grant to members of the public generally a right to be heard by public decision-making bodies. Id. at 283-84 (citing Bi-Metallic Investment Co. v. State Bd. of

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[27]Indeed, this case is before this Court precisely because the right to petition, possibly in its purest form, was invoked by the people, and the Plaintiffs were dissatisfied with the result. See also Mountain States Legal Foundation v. Denver School Dist. No. 1, 459 F. Supp. 357, 361 (1978)("Do not the people themselves, as the grantors of the power of government, have the right to freely petition for what they believe is an improvement in the exercise of that power?")

Equalization, 239 U.S. 441, 445 (1915)(opinion of Holmes, J., for the Court)). In fact, the Plaintiffs' attack on the initiative process stands the right to petition on its head:

> Citizens have the unquestioned right to petition their governments for redress of what they believe are grievances. One means of preserving this right is through the procedures of initiative, referendum and recall. Other constitutional rights conceivably can require interference with a referendum, but only in the most exceptional circumstances. The judicial branch of government properly hesitates to prevent citizens from voting on matters raised by an exercise of the constitutional right to petition the government. To do otherwise would be to enter a political thicket studded with constitutional thorns.

Diaz v. Board of County Comm'rs of Dade County, 502 F. Supp. 190, 193 (S.D. Fla. 1980)(citations omitted). Similarly, the Colorado Supreme Court has held that "the power of the initiative is to be liberally construed to allow the greatest possible exercise of this valuable right." City of Glendale v. Buchanan, 195 Colo. 267, 272, 578 P.2d 221, 224 (1978). Accord, McKee v. City of Louisville, 200 Colo. 525, 616 P.2d 969, 972 (1980).

B. Amendment 2 Does Not Abridge the Freedom of Expression

The Plaintiffs claim that, on its face, Amendment 2 violates their freedom of expression because it (1) excludes a particular idea or belief regarding sexual orientation from being acted on through normal legislative, executive, and judicial processes; (2) has the purpose and effect of limiting individual and collective advocacy of political, social, and economic change on their behalf; and (3) requires individuals to adopt a state-sponsored viewpoint

of homosexuality and bisexuality. The Plaintiffs believe that the First Amendment guarantees that all expression of any viewpoint will be free from risk of retaliation, reprisal, or other consequences from those private parties who might disagree. In effect, the Plaintiffs assert that the First Amendment protects their viewpoints from both governmental and private censorship and from both private and public consequences. These contentions are clearly incorrect.

Initially, as discussed earlier, there are several state and federal constitutional provisions which limit the ability of government to act on beliefs about race, sex, or religion. Yet, these restrictions have never been held to violate the freedom of expression of persons holding a contrary viewpoint. Cf. Hansen v. Guyette, 636 F. Supp. 902, 906 (D. Minn. 1986).[28] Clearly, government can make value choices without interfering with the First Amendment rights of those who disagree with the government's choice. The First Amendment does not guarantee that government action will not support a viewpoint different from one's own; it only protects the right to voice disagreement with the government action.

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[28]Police Dep't of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) does not hold that the State cannot discriminate against a particular idea. Mosley involved an ordinance restricting picketing based upon whether it was labor or non-labor-related, and stands for the proposition that government may not discriminate on the basis of the speech's content. It does not mean that government cannot choose one value or idea over another. Indeed, every governmental action represents a value choice in some area.

Amendment 2 does not limit the ability of the Plaintiffs to advocate on behalf of homosexuals or bisexuals. The Plaintiffs are still perfectly free to agree or disagree with Amendment 2 and to work for or against its repeal; the Plaintiffs' expressive rights will be neither greater nor less than they were previously. Indeed, "[a] person's right to speak is not infringed when government simply ignores that person while listening to others." Minnesota State Bd. for Community Colleges, 465 U.S. at 288.

Nor does Amendment 2 force the Plaintiffs or anyone else to adopt a particular viewpoint about homosexuality or bisexuality. Cf. Gay Student Services v. Texas A & M Univ., 737 F.2d 1317, 1329 (5th Cir. 1984), cert. denied, 471 U.S. 1001 (1985). Although the Plaintiffs may assert that Amendment 2 will have some sort of chilling effect on their free speech rights, they have failed to allege exactly how Amendment 2 will result in government-sponsored threats, harassment, or reprisals to specific individuals. Humphreys, Hutcheson, and Moseley v. Donovan, 755 F.2d 1211, 1220 (6th Cir. 1985); Master Printers of America v. Donovan, 751 F.2d 700, 704 (4th Cir. 1984), cert. denied, 474 U.S. 818 (1985).[29]

Even if the Plaintiffs can somehow demonstrate that Amendment 2 has increased the risk of espousing certain viewpoints, increased risk of negative reaction from private parties does not constitute a violation of the First Amendment. See Student Government Ass'n v. Board of Trustees of the Univ. of Massachusetts, 868 F.2d 473,

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[29]See also Buckley v. Valeo, 424 U.S. 1, 74 (1976); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958).

479 (1st Cir. 1989)(government is under no obligation to remove barriers to expression that are not created by the government).[30] The First Amendment merely guarantees the right to express viewpoints free from governmental interference; it does not guarantee that the expression of those viewpoints will receive a positive response from either public or private actors or even that the message will be heard.[31]

Every day, thousands of Coloradans refrain from expressing viewpoints on a variety of subjects because of fears of various forms of retaliation from private parties. The First Amendment simply means that a viewpoint will not be censored or chilled by the government; it does not mean that there will be no consequences from private parties for the expression of viewpoints.[32] For

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[30]See also May v. Evansville Vanderburgh School Corp., 787 F.2d 1105, 1109 (7th Cir. 1986); R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 87 (3d Cir. 1984)(First Amendment does not apply to private actions, only those of public parties). Cf. Hinman v. Lincoln Towing Services, Inc., 771 F.2d 189, 194 (6th Cir. 1985)(Constitution is a charter of negative liberties and does not impose any affirmative obligations to provide services or special protections).

[31]Moreover, the Plaintiffs appear to believe that the First Amendment's freedom of expression protects one's status as a homosexual or bisexual, the performance of homosexual or bisexual acts, and the expression of viewpoints about homosexuality or bisexuality. This is incorrect. At most, the First Amendment protects the expression of viewpoints about homosexuality or bisexuality from governmental censorship. Neither the First Amendment nor any other constitutional provision protects homosexual or bisexual acts or one's status as a homosexual or bisexual. See Bowers v. Hardwick, 478 U.S. 186 (1986).

[32]Although in some specific instances, government may be under some sort of obligation to protect demonstrators from potential harms such as mob violence, See Edwards v. South Carolina, 372 U.S. 229, 236-37 (1963), there is no general mandate for police protection from those who might disagree with the views being

example, when government prohibits racial, sexual, or religious discrimination, white supremacist groups might face increased risks for expressing their viewpoints. The courts do not regard this increased risk as a violation of the freedom of expression. Similarly, any increased risk to the Plaintiffs would not be regarded as a violation of the Plaintiffs' freedom of expression.[33]

Furthermore, contrary to the assertions of the Plaintiffs, Amendment 2 does not remove the right of the Plaintiffs or anyone else to seek redress for private acts of retaliation against them. Just as a person who is beaten or harrassed because of their religious or political views can seek redress from their attacker in a civil or criminal prosecution, a person who is beaten or harassed because of his/her views on homosexuality and bisexuality can seek criminal or civil redress.

Moreover, while Amendment 2 may make it more difficult for the Plaintiffs to achieve state or local governmental adoption of their viewpoint in as much as the Plaintiffs will have to win the passage of a constitutional amendment, this greater burden does not

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expressed. Sherrill by and through Wooden v. City of Longview, 683 F. Supp. 1108, 1112-13 (E.D. Tex. 1987).

[33]The Plaintiffs' reliance on cases where government has been precluded from compelling expression because of possible retaliation by private parties, such as N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), is misguided. Unlike Patterson, where the State wished to compel a form of expression which would inevitably lead to the private retaliation against specific individuals, the present case involves neither a compulsion nor a prohibition on expression. Thus, even if there is an increased risk to the Plaintiffs because of Amendment 2, the risk is far more remote and the link to the State far more tenuous than the risk presented in Patterson and similar cases.

constitute a infringement on their right of expression. Cf. Lyng v. International Union, United Auto, Aerospace, & Agric. Implement Workers of America, UAW, 485 U.S. 360, 368-69 (1988)(government has no obligation to minimize any resulting hardship from the exercise of right of expressive association).[34]

It is clear that while a state or local government can grant more protection than that required by the U.S. Constitution, that additional protection can be freely withdrawn without committing a federal constitutional violation. Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527, 538-39 (1982)(upholding a state constitutional amendment prohibiting state courts from ordering forced busing for desegregation absent a constitutional violation). When government withdraws that additional protection, it does not violate the First Amendment rights of those who disagree with the change in policy. In the present case, Denver, Aspen, and Boulder, like the state courts in California, chose to provide protections above and beyond those required by the United States Constitution. However, the people of Colorado, like the people of California, chose to amend their Constitution and rescind those protections. Neither the First Amendment nor any other constitutional provision requires

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[34]See also Board of Trustees, State Univ. of New York v. Fox, 492 U.S. 469, 476-78 (1989); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328, 340 (1986)(both upholding restrictions on speech which advocated legal activity). In addition, any reliance upon Merrick v. Board of Higher Educ., 116 Or. App. 258, 841 P.2d 646 (1992) is misplaced, since that case did not address the First Amendment. In invalidating a statute because it inhibited expression regarding sexual orientation, the Oregon court based its decision solely on an interpretation of its own state constitutional guarantee of freedom of expression. As discussed at p. 23, supra, this cannot be an issue for this court.

that government make the process of bringing change as easy as possible.

C. Amendment 2 Does Not Abridge the Freedom of Association

The Plaintiffs also appear to claim that, on its face, Amendment 2 violates their freedom of association. Amended Complaint at ¶¶ 39-42. The U.S. Supreme Court has recognized two distinct categories of the freedom of association: the First Amendment freedom of "expressive association" (which protects the ability to associate "for the purpose of engaging in protected speech or religious activities")[35] and a Fourteenth Amendment freedom of "intimate association" (which protects "against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships"). Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 618-22 (1984). See also Trujillo v. Board of County Comm'rs of the County of Santa Fe, 768 F.2d 1186, 1188 (10th Cir. 1985). Although the Plaintiffs are unclear as to whether they are alleging a violation of expressive association, intimate association, or both, it is clear that the Plaintiffs cannot show a violation of either type.

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[35]Although similar, there is a fundamental difference between freedom of expression and freedom of expressive association. The former refers to actual expressive actions, while the latter refers to associating together for the purpose of expression.

If the Plaintiffs are alleging a violation of the freedom of expressive association, then they must maintain that Amendment 2 somehow inhibits their ability to form advocacy groups, or to otherwise associate for the purposes of expressing their views regarding homosexuality and bisexuality. See New York State Club Ass'n v. City of New York, 487 U.S. 1, 13 (1988)("ability and the opportunity to combine with others to advance one's views is a powerful practical means of insuring the perpetuation of freedoms . . . . ")[36] Yet, on its face, Amendment 2 does not affect "in any significant way" the ability of the Plaintiffs to form associations that will advocate their viewpoints. See id.; Rotary, 481 U.S. at 548. There is no portion of Amendment 2 which requires, either explicitly or implicitly, that the Plaintiffs or any other persons or groups "abandon or alter" their expressive activities or their presumed viewpoints. New York Club, 487 U.S. at 13; Rotary, 481 U.S. at 548.

Moreover, it would be absurd to suggest that Amendment 2 compels the State or its institutions to revoke recognition of student or minority organizations which advocate homosexual and bisexual rights. There is nothing which compels the Plaintiffs or anyone else to adopt a particular viewpoint. In short, the Plaintiffs have the exact same expressive and associational rights now as they had prior to the passage of Amendment 2. The only

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[36]As explained earlier, the Plaintiffs' freedom of expression is not violated by Amendment 2.

difference is that the advancement of some of their political objectives is more difficult.

Moreover, while the Plaintiffs may claim that the adoption of a position which is contrary to their viewpoint, will somehow chill their freedom of expressive association, such a claim, even if true, would not amount to a constitutional violation. For example, both the state and federal governments have adopted viewpoints on the propriety of racial discrimination which are clearly contrary to those of white supremacist groups. Yet, this adoption of an anti-discrimination viewpoint does not mean that the expressive associational rights of white supremacist groups have in any way been abridged. Members of such groups are free to advocate their positions even though government has taken an opposing view, and even though an overwhelming majority of society disagrees with these views. See Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992). Indeed, the government has no obligation to maximize the freedom of expressive association or to minimize any resulting hardship from the exercise of the right. Lyng, 485 U.S. at 368-69.

In the alternative, if the Plaintiffs are attempting to allege a violation of their Fourteenth Amendment freedom of intimate association, then they must maintain that Amendment 2 somehow hinders their ability to form those relationships which presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal

aspects of one's life." Roberts, 468 U.S. at 619-20. See also Rotary, 481 U.S. at 545. Such relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." Roberts, 468 U.S. at 620.

On its face, Amendment 2 presents no legal barriers to the formation of these special relationships. Persons are not prohibited from entering into such relationships and Amendment 2 imposes no legal penalty for doing so. Cf. Bowers v. Hardwick, 478 U.S. 186 (1986)(upholding a Georgia statute criminalizing sexual relations between persons of the same sex). While Amendment 2 might be construed as implicitly expressing disapproval of certain types of relationships, there is no obligation that the State express its encouragement or even its neutrality toward the development of particular relationships. Indeed, the state government frequently expresses its implicit or explicit approval of certain relationships through, among other things, its tax laws.[37] Accordingly, unless it can be shown that the State has imposed an undue burden upon relationships, the freedom of intimate association is not implicated. Cf. Moore v. City of East

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[37]The federal government has long established a preference for traditional monogamous heterosexual relationships in the Internal Revenue Code. This preference has been uniformly upheld against constitutional challenge. E.g., Faraco v. Commissioner of Internal Revenue, 261 F.2d 387, 389 (4th Cir. 1958), cert. denied, 359 U.S. 925 (1959); Kellems v. Commissioner, 58 T.C. 556, 558-60 (1972), aff'd, 474 F.2d 1399 (2d Cir. 1973)(per curiam), cert. denied, 414 U.S. 831 (1973); Shinder v. Commissioner of Internal Revenue, 395 F.2d 222 (9th Cir. 1968).

Cleveland, 431 U.S. 494, 503-04 (1977)(living arrangements); Zablocki v. Redhail, 434 U.S. 374, 383-86 (1978)(marriage); Carey v. Population Services International, 431 U.S. 678, 684-86 (1977) (decision to have children); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925)(education of children).

Furthermore, to the extent that Amendment 2 conceivably could make persons less likely to enter into, or acknowledge, some types of relationships, such an effect would not constitute a violation of the Constitution. A mere adverse impact on the freedom of intimate association is not sufficient. A 42 U.S.C. § 1983 claim for violation of the freedom of intimate association must include "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association . . . ." Trujillo, 768 F.2d at 1190. See also Morfin v. Albuquerque Public Schools, 906 F.2d 1434, 1440 (10th Cir. 1990); Apodaca v. Rio Arriba County Sheriff's Dep't, 905 F.2d 1445, 1448 (10th Cir. 1990). The meaning of Amendment 2, as discussed earlier, precludes any such claim. If anything, Amendment 2 serves to protect intimate association.

D. Amendment 2 Does Not Abridge the Establishment Clause

The Plaintiffs' federal Establishment Clause claim is unfounded.[38] The U.S. Supreme Court utilizes a three-part test to analyze the constitutionality of a policy or law challenged under

[38]That they recognize this is in part demonstrated by their recent to wholly abandon this claim on the eve of trial.

the federal Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). See also Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992)(refusing to abandon the Lemon test).[39] To pass constitutional muster under the Lemon test:

> [f]irst, the [state constitutional provision] must have a secular legislative purpose; second its principal effect must be one that neither advances nor inhibits religion . . . ; finally, the [the state constitutional provision] must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13.[40]

It is obvious that Amendment 2 passes all three prongs. First, Amendment 2 has secular purposes of avoiding the dilution of existing civil rights programs by limiting the expansion of special protections, as well as accommodating competing First Amendment rights. It is clear that the actual purpose of Amendment 2 is not to endorse or disapprove of any religion. In order to determine if there is a secular purpose, a court looks at statute on its face, legislative history, or administrative interpretation. Edwards v. Aguillard, 482 U.S. 578, 594 (1987).[41] Because it is not intended

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[39]In determining if the Establishment Clause has been violated, the role of the court is not to construct a new jurisprudence but merely to apply the well-established principles of this area of the law. Stark v. St. Cloud State Univ., 604 F. Supp. 1555, 1559-60 (D. Minn. 1985), aff'd, 802 F.2d 1046 (8th Cir. 1986).

[40]See also Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305 (1985); Committee for Public Educ. v. Regan, 444 U.S. 646, 653 (1980); Roemer v. Maryland Public Works Bd., 426 U.S. 736, 748 (1976).

[41]See also Wallace v. Jaffree, 472 U.S. 38, 56 (1985)(in determining if a secular purpose exists, it is appropriate to ask whether the actual purpose is to endorse or disapprove of a religion).

to endorse or disapprove of any religion, and there is a clear secular purpose, the first prong of the Lemon test is satisfied.[42]

Second, it is clear that Amendment 2 does not have the primary effect of advancing or inhibiting religion. Plaintiffs apparently claim that since the policy expressed by Amendment 2 and some of its supporters may well have religious antecedents, its passage amounts to an "establishment of religion" in violation of the First Amendment. However, Plaintiffs must allege precisely which religious creed the people intended to, or in fact have, established through the passage of Amendment 2. Even among the varying Christian confessions, there was a wide range of responses, from strong support to neutrality to zealous opposition; many religious groups publicly opposed Amendment 2.

Although the traditional view of homosexuality and bisexuality in the United States has been founded in large part upon historic moral and religious tenets, the mere fact that Amendment 2 happens to coincide or harmonize with the tenets of some religion does not render it unconstitutional. Hernandez v. C.I.R., 490 U.S. 680, 696 2147 (1989). See also American Jewish Congress v. City of Chicago, 827 F.2d 120, 127 (7th Cir. 1987)(recognition and accommodation of

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[42]Moreover, it is clear that if a statute is motivated by both secular and sectarian purposes, it does not violate the Establishment Clause. See International Ass'n of Machinist and Aerospace Workers, Lodge 751 v. Boeing Co., 833 F.2d 165, 167 (9th Cir. 1987), cert. denied, 485 U.S. 1014 (1985); Cammack v. Waihee, 673 F. Supp. 1524, 1531 (D. Haw. 1987), aff'd, 932 F.2d 765 (9th Cir. 1988). In addition, courts should defer to the State's assertion of a secular purpose. Cammack, 673 F. Supp. at 1531. See also Libin v. Town of Greenwich, 625 F. Supp. 393, 399 (D. Conn. 1985)(even if a law provides an "incidental" endorsement of religion, it can still pass constitutional muster.)

religious sentiments is not the same as intentionally promoting a particular religious viewpoint). Nor is an indirect benefit to religion sufficient to make a law unconstitutional. Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684, 691 (11th Cir. 1987). For example, although Sunday closing laws coincide with the tenets of many religious groups, the U.S. Supreme Court has repeatedly upheld them:

> [T]he fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

McGowan v. Maryland, 366 U.S. 420, 445 (1961).

The intuitive sense of this analysis can be illustrated through an examination of other provisions of our law the validity of which even Plaintiffs would concede. There can be no doubt that legal proscriptions upon homicide,[43] robbery and theft,[44] perjury,[45] Sunday liquor sales,[46] adultery and bigamy,[47] incest,[48] as

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[43]Sections 18-3-101 through 107, et seq., C.R.S. (1992). Compare Exodus 20:13 ("Thou shalt not kill.")

[44]Sections 18-4-301 through 304, and 18-4-401 through 415, et seq., C.R.S. (1992). Compare Exodus 20:15 ("Thou shalt not steal.")

[45]E.g., sections 1-13-104, 18-8-501 through 509, et seq., 24-4-104, 24-9.5-103, 24-12-106, 30-10-417, 42-2-122, and 42-3-104, C.R.S.(1992), among others. Compare Exodus 20:16 ("Thou shalt not bear false witness against thy neighbor.")

well as other offenses, are founded upon historic societal notions of morality.[49] Indeed, the Uniform Marriage Act, § 14-2-101, et seq., which is limited to heterosexual relationships, has as its express purpose "[t]o strengthen and preserve the integrity of marriage and to safeguard meaningful family relationships."[50] Nonetheless, such provisions cannot be said in any fashion to amount to an attempt by government to establish any religious

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[46]Section 12-47-128, C.R.S. (1992). Compare Exodus 20:8 ("Remember the sabbath day, to keep it holy.")

[47]Sections 18-6-201 and 18-6-501, C.R.S. (1992). Compare Exodus 20:14 ("Thou shalt not commit adultery.")

[48]Sections 18-6-301 and 302, C.R.S. (1992). Compare Leviticus 18:6-12.

[49]"The law, however, is constantly based on notions of morality, and if all laws representing moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed." Bowers v. Hardwick, 478 U.S. 186, 196 (1986), reh'g denied, 478 U.S. 1039 (1987).

[50]Section 14-2-102(2)(a), C.R.S. Numerous courts have upheld statutes excluding same-sex marriages under a rational basis test because "marriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race . . . . . ." Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, 1194 (1974). Accord Adams v. Howerton, 486 F. Supp. 1119 (S.D. Cal. 1980), aff'd, 673 F.2d 1036 (9th Cir.), cert. denied, 458 U.S. 1111 (1982); Baker v. Nelson, 291 Minn. 310, 191 N.W.2d 185 (1971); In re Estate of Cooper, 149 Misc. 2d 282, 564 N.Y.S. 2d 684, 687 (N.Y. Surr. Ct. 1990)("The Legislature has chosen to restrict the right to marry to people of the opposite sex, a classification which has a rational basis and which does not offend the equal protection right of the Fourteenth Amendment . . . ."); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973)("We find no constitutional sanction or protection of the right to marriage between persons of the same sex.") Compare Baehr v. Lewin, 852 P.2d 44 (Haw. 1993)(plurality opinion), in which the Hawaii Supreme Court found that Hawaii's statute limiting marriage to heterosexual couples violated the Equal Rights Amendment of the Hawaii Constitution. Amendment 2 is not susceptible to such a challenge, inasmuch as it cannot be said to violate any provision of the Colorado Constitution.

doctrine. Since Amendment 2 does nothing to promote or inhibit a specific religion, it passes the second prong of the Lemon test.

Third, Amendment 2 does not foster excessive entanglement between government and religion. The entanglement analysis is one of degree and generally focuses on the amount of financial support given to religious organizations and the involvement of government in religion. Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970)("for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.") See also American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 269-70 (7th Cir.), cert. denied, 479 U.S. 961 (1986); Amico v. New Castle County, 101 F.R.D. 472, 496 (D. Del. 1984), aff'd, 770 F.2d 1066 (3d Cir. 1985); Southside Fair Housing Comm. v. City of New York, 750 F. Supp. 575, 581 (E.D.N.Y. 1990), aff'd, 928 F.2d 1136 (2d Cir. 1991). Amendment 2 contemplates no such sponsorship, financial support, or governmental involvement in religious activity.[51]

Perhaps most relevant here is the holding of National Gay Task Force v. Board of Educ. of the City of Oklahoma City, 729 F.2d 1270, 1273 (10th Cir. 1984), aff'd, 470 U.S. 903 (1985). There, a

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[51]Moreover, while the Plaintiffs may assert that Amendment 2 encourages political divisiveness along religious lines within Colorado in that some religions are opposed to it while others support it, this assertion, even if proven, is insufficient. It is clear that the promotion of political divisiveness along religious lines is not a consideration in determining violations of the Establishment Clauses except where the situation involves aid to parochial schools. Clayton by Clayton v. Place, 884 F.2d 376, 379 (8th Cir. 1989), cert. denied, 494 U.S. 1081 (1990).

statute allowing teachers to be dismissed for homosexual activity was found not to violate the federal Establishment Clause. Obviously, if a statute which explicitly imposes a severe penalty upon homosexual conduct is constitutional, Amendment 2 cannot be viewed as violating the Establishment Clause.

V. THE PLAINTIFFS ARE NOT MEMBERS OF A SUSPECT CLASS

To the extent that the court believes that Plaintiffs are entitled to a ruling on whether homosexuals and bisexuals qualify for "suspect" class protections,[52] the Court must resolve that issue against them.

Although they have not pled it, the Plaintiffs have introduced a new claim that Amendment 2 also discriminates on the basis of gender. This argument is meritless. E.g., DeCintio v. Winchester County Medical, 807 F.2d 304, 307-08 (2d Cir. 1986)(gender discrimination is grounded on distinctions "based on a person's sex, not on his or her sexual affiliations"); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (same); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, 1193-95 (1974)(Washington's Equal Rights Amendment not implicated by prohibition of same sex marriages). That this is evident to the Plaintiffs, is demonstrated by their expert's testimony at the preliminary injunction hearing, p. 14 supra, explictly distinguishing one's biological sex from one's sexual orientation. The Plaintiffs

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[52]The Defendants have concomitantly filed with the Court a Motion in Limine, to preclude evidence and argument on the suspect class issue, primarily because it was not pled.

biological sex from one's sexual orientation. The Plaintiffs cannot, then, rely on the already-established "quasi-suspect" classification of sex, but rather must establish one of their own.

In order to qualify as a suspect class, homosexuals and bisexuals would have to: 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics which define them as a group; and 3) be politically powerless, in the sense of an inability to attract the attention of lawmakers. See, e.g., Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-47 (1985); High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563, 573, reh'g denied, 909 F.2d 375 (9th Cir. 1990).[53] Although "[h]omosexuals have suffered a history of discrimination and still do, though possibly now in less degree," Ben-Shalom v. Marsh, 881 F.2d 454, 466 (7th Cir. 1989), see also High Tech Gays, 895 F.2d at 573, such discrimination does not rise to the level to warrant suspect class protections. In any event, they cannot satisfy either of the other two criteria.

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[53]The Plaintiffs attempt to misconstrue language from Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) to argue there is an alternative suspect class criteria which makes it unnecessary for them to meet those well-establsihed in constitutional law. Specifically, they claim that if a class is defined by a trait "not truly indicative of their abilities," then that trait need not be immutable. However, this language does nothing more than elaborate upon the concept of historical discrimination. To find otherwise would fly in the face of judicial determinations that persons such as the elderly are not members of a suspect class. Cf. Gregory v Ashcroft, 111 S. Ct. at 2407 ("It is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all.")

Homosexuals have never been subjected to systemic governmental discrimination on the basis of their status, that is, apart from homosexual conduct. This stands in sharp contrast to the experience of black Americans over the past three centuries. Indeed, this is borne out by the fact that homosexuals exceed average Americans in education and income.[54] They also have political power disproportionately greater than their numbers.[55] Their purchasing power and political influence have esconced them among America's most elite groups. In large part, this differential may be attributed to the absence of distinguishing or obvious characteristics.

The evidence the Plaintiffs elicited at the preliminary injunction hearing defeats any claim that homosexuals exhibit an "obvious," much less an "immutable" trait. Without some outward action, one citizen's sexual orientation cannot be known to another. The fact of the matter is that the behavioral component of sexual orientation distinguishes it from other traits which necessarily define membership in suspect classes from birth.

As an initial matter, those circuit courts of appeal which have addressed the immutability issue have found as a matter of law that "[h]omosexuality is not an immutable characteristic; it is behavioral and hence fundamentally different from traits such as

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[54]Homosexuals' greater earnings also yield a disproportionately larger amount of discretionary income because the overwhelmingly majority of them have no familial obligations.

[55]Homsoexuals enjoy superior lobbying clout, voting turnout, national political party influence, and nationwide legislative successes.

race, gender, or alienage, which define already existing suspect and quasi-suspect classes." High Tech Gays, 895 F.2d at 573; see also National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984)("We cannot find that a classification based on the choice of sexual partners is suspect . . . .")

Although Dr. Gonsiorek labeled homosexuals as having an "immutable" trait, at least by the time they were adults, the facts he testified to (and upon which the Plaintiffs otherwise relied in their briefs) do not support that conclusion. Dr. Gonziorek related that it is "unclear" why a particular sexual orientation develops in a person; "[t]here be multiple genetic factors involved, and in addition there may be multiple environmental factors involved," (tr. 1/11/93, pp. 89-90).[56]

Indeed, the Plaintiffs have specifically conceded that they cannot say whether sexual orientation is an immutable characteristic:

> The reasons why a particular sexual orientation develops in any individual are complex. Various theories suggest genetic and prenatal hormonal factors, unconscious mental processes related to early childhood events or family relationships, learned associations between physiological arousal and external stimuli, reinforcement of sexual experiences with partners of a particular gender and subsequent applications of social labels to one's experiences, and bonding experiences with same-sex or other-sex peer groups in adolescence.

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[56]Contrary to Dr. Gonsiorek's assertion, there is no proof of a genetic link to homosexuality. There is at most a suggestion of such a link predicated upon recent, and as yet, unvalidated studies.

Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 20-21. This being the case, the Plaintiffs cannot now be heard to claim that homosexual or bisexual orientation is immutable.

Indeed, in Steffan v. Cheney, 780 F. Supp. 1, 6-7 (D. D.C. 1991), the court found the fact that "the scientific community" was "unclear" and "still quite at sea" about the causes and attributes of sexual orientation, fell short of warranting a finding of an immutable group characteristic:

> It is not for this Court to say definitively whether sexual orientation is always chosen by the individual, but it is apparent that it sometimes is chosen. This realization puts sexual orientation closer to the category of alien adults who are not a suspect class under Plyler [v. Doe], 457 U.S. 202 (1982)) than to their children who did not choose their status.

Id. at 6-7 (emphases in original). See also Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989)(comparing the immutable characteristics of suspect and quasi-suspect classes with the "primarily behavioral" characteristics of homsoexuality).[57]

Moreover, even if the Plaintiffs' proffered evidence, if believed, could support a claim of immutability, "it is still clear that homosexuals as a class enjoy a good deal of political power in our society . . . ." Steffan, 780 F. Supp. at 8-9, not only with

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[57]Indeed, there is substantial evidence of the ability of homosexuals to become heterosexuals if they desire to. This alone is adeqaute to cast significant doubt upon any claim that homosexuality is an immutable trait.

Significantly, the courts in Steffan and Woodward were presented with -- and rejected -- evidence from the very same expert as the Plaintiffs have proffered to this court, Kenneth Sherrill.

respect to themselves, but also with respect to issues of the day that affect them. See High Tech Gays, 895 F.2d at 574 ("homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers'. . . .")[58]

> It is beyond doubt that the homosexual community has been able to reach out and gain the attention of politicians of all sorts. One need only remember St. Patrick's Day in 1991 in New York City to see Mayor David Dinkins marching in the traditionally Irish-Catholic parade with homosexual groups and activists who were important supporters during his tough mayoral campaign. There are many other important and high visibility issues which have brought the homosexual community into the political landscape in this country and in the states, not the least of which is the AIDS epidemic and the related issues of funding for research and drugs, school attendance for children who are HIV-positive, and insurance coverage for victims.
>
> Assuming arguendo that there is continuing antipathy and prejudice exhibited towards the plaintiff's class, it cannot successfully be maintained that the political branches are not paying attention to homosexuals or those who advocate legislation favorable to them.

Steffan, 780 F. Supp. at 8-9 (emphases in original)(citing 8 major cities -- excluding Denver -- which had passed antidiscrimination regulations concerning homosexuals; four states which had statewide legislation or regulations which benefit homosexual groups; and how "homosexual groups have been well publicized, heard and heeded by the political branches of our federal, state and local governments

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[58]See also Cleburne, 473 U.S. at 445 (political powerlessness measured not in terms of ultimate success, but rather on the "ability to attract the attention of the lawmakers.")

when it has come to dealing with the HIV epidemic and other related issues.")[59]

Indeed, this court need go no further than the maelstrom surrounding the present controversy to realize that the homosexual community is anything but politically powerless. As discussed earlier, homosexuals had successfully advanced their political agenda in numerous forums, both state and local, before Amendment 2 was ever proposed. This court may certainly take judicial notice of the fact that news articles about, and editorials on, Amendment 2 frequently appear in the two largest circulating newspapers throughout the State, the Rocky Mountain News and the Denver Post. Similarly, the evidence beofre the court will show that: prior to the election, opponents succeeded in stifling pro-Amendment 2 advertising on many of the television and radio stations in the Denver metro area;[60] a national boycott of Colorado has been waged; the boycott has gained tremendous momentum, and, at present includes a number of significant public and private adherents.

More significantly, numerous prominent political figures at the local, state, and federal levels of government, aligned themselves with homosexual groups in the quests first to defeat, then to "undo," Amendment 2; U.S. Representative Patricia Schroeder wrote an editorial indicating she would seek to overturn the

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[59]Indeed, advocates succeeded in having the American Psychiatric Association remove homosexuality from the list of psychiatric disorders, without adequate clinical findings.

[60]The evidence will show that homosexual lobbies exert such influence over the media, as to skew the debate over homosexual issues.

results of the election through federal legislation; the Mayor of the City and County of Denver has appeared on nationally syndicated talk shows, expressing his and his constituents' disagreement with the passage of the Amendment; and three prominent Colorado city governments are in this very lawsuit challenging the validity of Amendment 2. These papers also reported that the President of the United States -- who campaigned on a platform which included support for special protections for homosexuals -- has taken a personal interest in reviewing the way in which homosexuality is viewed by our Armed Services. It defies reason to claim that homosxuals are a politically powerless group. See Cleburne, 473 U.S. at 440-47 (despite having immutable characteristics and a history of discrimination, mentally retarded individuals were not sufficiently politically powerless to require even "quasi-suspect" class status).

Finally, there is another reason why homosexuals cannot, as a matter of law, qualify as a suspect class, no matter what facts they produce. In the aftermath of Bowers v. Hardwick, 478 U.S. 186 (1986), "[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause." Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987). Accord Ben-Shalom, 881 F.2d at 464 "If homosexual conduct may constitutionally be criminalized, then (homosexuals do not constitute a suspect class entitled to greater than rational basis scrutiny for equal protection purposes"); Woodward, 871 F.2d at

1076 ("After Hardwick, it cannot be logically asserted that discrimination against homosexuals is constitutionally infirm.") See also L. Tribe, American Constitutional Law, § 16-33, 1616 n.47 (2d ed. 1988)(in the aftermath of Hardwick it is "unlikely . . . that homosexuality will be deemed quasi-suspect in the near future").

VI. AMENDMENT 2 IS VALID AS AN EXERCISE OF THE PEOPLE'S RESERVED POWERS UNDER THE TENTH AMENDMENT

Even if Amendment 2 is found to be in conflict with the Fourteenth Amendment to the U.S. Constitution, it is nonetheless valid as an exercise of the people's reserved powers under the Tenth Amendment. The Tenth Amendment provides: "The powers delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[61]

While this reservation of powers has never been the subject of judicial interpretation, courts are obligated to give full effect and force to each provision of the Constitution. Ullman v. United States, 350 U.S. 422, 428 (1956); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).[62] In the Tenth Amendment, the Constitution explictly validates reservations of power to the people, as

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[61]U.S. Const. amend. X (emphasis supplied).

[62]It bears noting that the Tenth Amendment is part of the federal Bill of Rights, having been adopted simultaneously with the first nine amendments. As such, it must be regarded as on an equal footing and not inconflict with those provisions upon which the Plaintiffs base all of their federal "fundamental rights" claims.

distinguished from powers reserved to the several States. Therefore, cases such as Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528 (1985) are inapposite. The considerations which mitigate against recognition and vindication of Tenth Amendment rights as to States -- most notably the national political process, Garcia, 469 U.S. at 551-52 -- are not applicable to situations where the people themselves have exercised their sovereign power over their government.

> [T]he ultimate authority, wherever the derivative may be found, resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere over the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

The Federalist, No. 46 (J. Madison).

The federal constitution explictly authorizes such a reservation of power, and the state constitution makes a further explicit reservation to the people of the power to restructure their government. Colo. Const. art. V, § 1. In fact, "the people always possessed the sole right to amend the constitution and never limited themselves as to the contents of amendments to it." People v. Prevost, 55 Colo. 199, 211, 134 P. 129, 133 (1913). "The people have the sovereign right to amend their constitution if they so desire, and courts have no power to amend it for them." Id., 55 Colo. at 212, 134 P. at 133. Furthermore, "[t]his right is of the first order; it is not a grant to the people but a reservation by them for themselves." McKee v. City of Louisville, 200 Colo. at

529, 616 P.2d at 972 (citing In re Legislative Reapportionment, 150 Colo. 380, 374 P.2d 66 (1962).

Perhaps most instructive here is the recent decision in Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), where the U.S. Supreme Court considered the enforceability of the federal Age Discrimination in Employment Act ("ADEA").[63] In invalidating the applicability of the ADEA to a mandatory retirement age for state judges, the Court relied heavily upon the "political function" doctrine, which concerns matters "intimately related to the process of democratic self-government." Id. at 2402. This rule is founded upon "a recognition of a State's constitutional responsibility for the establishment and operation of its own government . . . ." Id.[64] The Court then noted that:

> this Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, this Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

Id. at 2405.

The structure of the political process, particularly as established through by constitutional amendment, is an integral part of popular self-government as established in Colorado. As such, it "is a power reserved to the States under the Tenth

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[63]29 U.S.C. §§ 621-634.

[64]Cf. Gregory v. Ashcroft, 111 S. Ct. 2395, 2405 (1991)("These cases demonstrate that the Fourteenth Amendment does not override all principles of federalism.")

Amendment and guaranteed them by [the Guaranty Clause]," 111 S. Ct. at 2402 (citing Sugarman v. Dougall, 413 U.S. 634, 648 (1973), and has force "even as against the proscriptions of the Fourteenth Amendment."

Indeed, even if the people's adoption of Amendment 2 is otherwise prohibited by the Fourteenth Amendment, it is not subject to the Fourteenth Amendment because there is no "state action." The reach of the Civil War amendments was specifically considered by Congress, and the state action limitation was deliberately inserted so as to only restrict state governments, not the people.[65] As such, Amendment 2 is not subject to facial invalidation because its adoption was not a matter of state action. Only if it is to be enforced by government against private parties will it be susceptible to the constraints of the Fourteenth Amendment. Inasmuch as Amendment 2 is only intended, and by its own terms may be, enforced against state and local governments, the Tenth Amendment acts as an affirmative bar to the application of the Fourteenth Amendment. Therefore, the Plaintiffs' federal constitutional challenges to the adoption of Amendment 2 must fail.

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[65]Compare the Thirteenth Amendment, which prohibits private conduct ("Neither slavery nor involuntary servitude . . . shall exist within the United States"), with the Fourteenth Amendment, which only restrains state governments ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.")

VII. AMENDMENT 2 ADVANCES SEVERAL RATIONAL AND COMPELLING STATE INTERESTS

The Colorado Supreme Court has imposed the burden of demonstrating a compelling interest upon the Defendants only as to the "right to participate equally in the political process." As to all of the Plaintiffs' other claims, the Plaintiffs have the burden of showing that Amendment 2 is not rationally related to any legitimate governmental interest. The Defendants have previously articulated the rational bases underlying Amendment 2: promoting associational and religious rights, maintaining the integrity of established civil right protections, and achieving statewide uniformity on this divisive issue. See Brief in Support of Motion to Dismiss Amended Complaint at 73-79.

In applying the rational basis test, this court must ask whether it is conceivable that Amendment 2 bears some rational relationship to any legitimate purpose of government. See Pennell v. City of San Jose, 485 U.S. 1, 14 (1988). Further, "if any state of facts reasonably may be conceived to justify it," Amendment 2 must be upheld. Sullivan v. Stroop, 496 U.S. 478, 485 (1990).[66] Indeed, the State may pursue legitimate objectives through means that are imperfect, even "illogical . . . and unscientific." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980). Moreover, it is the party challenging the

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[66]See also Roley v. Pierce County Fire Protection Dist. No. 4, 869 F.2d 491, 493 (9th Cir. 1989) Dimond v. District of Columbia, 792 F.2d 179, 186 (D.C. Cir. 1986); Wheeler v. United States, 768 F.2d 1333, 1337 (Fed. Cir. 1985), cert. denied, 474 U.S. 1081 (1986).

constitutionality which must convince the Court beyond a reasonable doubt,[67] that no conceivable purpose for Amendment 2 is rationally related to a legitimate governmental interest. See Vance, 440 U.S. at 101, 111; Gregory v. Ashcroft, 111 S. Ct. at 2407-08.[68] When assessed against these standards, Amendment 2 is clearly rationally related to a legitimate governmental interest.

In addition, the State has proferred several not only rational, but compelling interests. Importantly, the issue of public morality, which has been at the crux of this litigation since its inception, permeates the discussion of compelling interests and indeed, can be regarded as a compelling interest in its own right. See Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2461-62 (1991)(plurality opinion)(finding that the State's interest in "protecting order and morality" is "compelling; substantial; subordinating; paramount; cogent, strong.") See also id. at 2465 (Scalia, J., concurring)(citing Bowers v. Hardwick, 478 U.S. at 196). In this case, society's moral judgment is not that certain persons should be punished for their sexual orientation, but rather that such orientation should not be a basis for additional or special rights. Cf. Bowers v. Hardwick.

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[67]See People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989).

[68]The Plaintiffs' reliance on City of Cleburne v. Cleburne Learning Center, 473 U.S. 432 (1985) for the proposition that the State must prove rationality is misguided. Such a change in the law, which would be both fundamental and far-reaching, was not accomplished by Cleburne. See Gregory v. Ashcroft, 111 S. Ct. 2395, 2407-08 (1991) and Steffan v. Cheney, 780 F. Supp. at 10. See also Baker v. City of Concord, 916 F.2d 744, 748 (1st Cir. 1990).

A. Determining What Constitutes a Compelling Interest

In order to determine whether Amendment 2 is justified by a compelling interest, it is necessary first to examine the nature of such interests. Essentially, compelling interests and fundamental rights are two sides of the same coin. See Gottlieb, Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication, 68 B.U. L. Rev. 917 (1988). Fundamental rights are "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed,'" Bowers v. Hardwick, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937), and are "deeply rooted in this Nation's history and tradition." Id. (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)(opinion of Powell, J.)).[69] Similarly, compelling interests are those interests with textual recognition in the Constitution, or its amendments, or values found to be implied because they are "fundamental" to the preservation of American society. Compare J.

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[69]These principles attempt

> to identify some source of constitutional value that reflects not the philosophical predilections of individual judges, but basic choices made by the people themselves in constituting their system of government . . . and they seek to achieve this end through locating fundamental rights either in the traditions and consensus of our society as a whole or in the logical implications of a system that recognizes both individual liberty and democratic order.

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 790 (1986)(White, J., dissenting)(citation omitted).

Nowak & R. Rotunda, Constitutional Law § 13.4(c) (4th ed. 1991). In other words, fundamental rights define those circumstances where government may not act, and compelling interests define those circumstances where government may act in order to preserve the larger society.

To understand this relationship, one need look no further than the various permutations of the fundamental right of privacy. J. Nowak & R. Rotunda, Constitutional Law § 11.7 (4th ed. 1991)(listing child-rearing, marital decisions, and child bearing as part of the fundamental right to privacy). For example, there clearly is a fundamental right to direct the upbringing of one's children. See Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Yet, if a child is critically ill and the parents refuse to allow medical treatment, the State may override the fundamental right and order the treatment. E.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905). Thus, the parents' fundamental right is subordinate to the State's compelling interest in preserving the welfare of children in American society. Moreover, although there is a fundamental right to choose one's spouse, Boddie v. Connecticut, 401 U.S. 371 (1971); Loving v. Virginia, 388 U.S. 1, 12 (1967), the State can and does impose numerous valid restrictions on who one can marry. See § 14-2-110, C.R.S. (1993); cf. Reynolds v. United States, 98 U.S. 145 (1879). The compelling interests underlying these restrictions include preventing the exploitation of children, reinforcing societal moral norms, and reducing the likelihood of

genetic defects. This pattern is equally true with respect to those fundamental rights which are inferred from, but which are not, permutations of the right to privacy.[70]

Compelling interests, then are those societal interests which are "implicit in the concept of ordered liberty," and are "deeply rooted in this Nation's history and tradition." It is against this standard that the proffered interests should be assessed.[71]

B. Amendment 2 Serves to Deter Factionalism

The stability of a State's political system, including combatting "unrestrained factionalism," is a compelling interest. Storer v. Brown, 415 U.S. 724, 736 (1974). In Storer, the U.S. Supreme Court upheld California statutory provisions that barred independent candidates from the general election ballot if they had

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[70]The same thing could be said about the fundamental rights which are explicitly enumerated in the text of the constitution. For example, there are a seemingly infinite number of exceptions and modifications, all of which are motivated by compelling state interests, to the free speech clause of the First Amendment. For example, although the Supreme Court has recognized a right of association, National Ass'n for the Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. at 460-61, that right may be restricted because of the compelling state interest of eradicating previous discrimination and thereby improving American society. Roberts v. United States Jaycees, 468 U.S. 609 (1984). Similarly, although there is a fundamental right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the government may restrict the rights of some persons (i.e., persons on parole) to travel in order to further other compelling interests. Finally, even the right identified by the Colorado Supreme Court, the right to participate in the political process, can be restricted in some ways. E.g., Gordon v. Lance, 403 U.S. 1 (1971); James v. Valtierra, 402 U.S. 137 (1971).

[71]Of course, this formulation does not speak to whether a given compelling interest is narrowly tailored in a particular case. See part II of this brief, infra.

been defeated in a party primary that year, or had been registered with a political party within the past year. Noting that "the Constitution does not require the State to choose ineffectual means to achieve its aims," id., the Court held that "[i]t is an absolute bar to candidacy, and a valid one." Id. at 737.

Subsequently, in Anderson v. Celebreeze, 460 U.S. 780 (1983), the Court reviewed a statute requiring independent candidate for President to file by March 20, in order to appear on the November ballot. In invalidating the statute, but reaffirming Storer, the Court found a critical distinction in that:

> it is important to recognize that Storer upheld the State's interest in avoiding political fragmentation in the context of elections wholly within the boundaries of California. The State's interest in regulating a nationwide Presidential election is not nearly as strong; no State could single-handedly assure "political stability" in the Presidential context.

460 U.S. at 804 (footnote omitted).[72]

Amendment 2 does not purport to serve any interests outside of Colorado's borders; rather, it simply seeks to ensure that the deeply divisive issue of homosexuality does not serve to fragment

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[72]The Court also found that the burden upon associational rights in Anderson distinguished it from Storer. Anderson v. Celebreeze, 460 U.S. 780, 791 n.12 (1983)("Although a disaffiliation provision may preclude such voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirement.") In addition, the consequences of failing to meet the statutory deadlines were entirely different for party primary candidates and independent candidates. Id. at 799. In contrast, the burden of amending the Colorado Constitution falls equally on all groups. In 1992, the proponents of Amendment 2 bore this burden; in future years, the opponents shall bear the same burden.

Colorado's body politic. Amendment 2 eliminates city-by-city and county-by-county battles over the political issue of homosexuality and bisexuality. As a matter of law, therefore, Amendment 2 serves a compelling state interest by ending political fragmentation and promoting statewide uniformity on this issue. As the controversy surrounding this litigation amply demonstrates, this concern is justified.

C. Amendment 2 Preserves the Integrity of the State's Political Functions

The Colorado Supreme Court's legal conclusions were not limited in their application solely to homosexuals and bisexuals, but instead extend to any "independently identifiable class of persons . . . ." 854 P.2d at 1282. Assuming, arguendo, the correctness of that court's interpretation of Hunter v. Erickson, 393 U.S. 385 (1969), and its progeny,[73] the application of this doctrine to a state constitutional provision has implications for state government which distinguish the case at bar from both Hunter (initiated charter amendment) and Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)(initiated statute). Indeed, this doctrine directly threatens the integrity of state governments.

In Gregory v. Ashcroft, 111 S. Ct. 2395 (1991), the U.S. Supreme Court discussed the "political function" doctrine, which concerns matters "intimately related to the process of democratic

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[73]The Defendants filed a petition for certiorari review with the U.S. Supreme Court on September 17, 1993.

self-government." Id. at 2402. This rule is founded upon "a recognition of a State's constitutional responsibility for the establishment and operation of its own government . . . ." Id.[74] The Court in Gregory specifically noted that the Tenth Amendment may serve as a substantive limitation upon the Fourteenth Amendment:

> [T]his Court has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, this Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment.

Id. at 2405.

The ability to amend or restructure the state constitution is an integral part of state government and, as such, it "is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guaranty Clause]." 111 S. Ct. at 2402 (citing Sugarman v. Dougall, 413 U.S. 634, 648 (1973). Although this court has correctly observed that Amendment 2 "does not fundamentally alter our form of government," (Order of July 16, 1993 at 7), any ultimate determination of its unconstitutionality on the grounds indicated by the Colorado Supreme Court assuredly does.[75] It

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[74]See also Coyle v. Smith, 221 U.S. 559 (1911)(a State has the sole, inviolate authority, as an attribute of its sovereignty, to determine the site of its own capital).

[75]Indeed, the U.S. Supreme Court has recognized that "the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws." In re Duncan, 139 U.S. 449, 461 (1891). Cf. Grant v. Meyer, 828 F.2d 1446, 1455 n.14 (10th Cir. 1987), aff'd, 486 U.S. 414 (1988)(quoting McKee v. City of Louisville, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980)(The

directly undermines the guaranty of a republican form of government because it will foster legal challenges to the validity of the state government itself whenever a citizen has a dispute with that government, and it will become incumbent upon the courts to disregard the existence and enactments of the State.[76]

Moreover, since the Tenth Amendment and the Guaranty Clause are explicit constitutional principles to which this Court is obliged to give full force and effect, Ullman v. United States, 350 U.S. 422, 428 (1956),[77] and "the Fourteenth Amendment does not override all principles of federalism," Gregory v. Ashcroft, 111 S. Ct. at 2405, they are rightly regarded as compelling interests.[78]

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initiative is "a fundamental right at the very core of our republican form of government.")

[76]Compare Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118, 141-42 (1912). See also Note, The *Hunter* Doctrine: An Equal Protection Theory That Threatens Democracy, 38 Vand. L. Rev. 397, 428 (1985)(emphases in original)("Without limitations it could empower any individual voter whose cause is unsuccessful in a referendum to overturn that referendum simply because the majority imposed its will on what is clearly a minority concern. Taken to its logical extreme, then, the equal protection clause could establish a tyranny of the minority, or, worse, the courts, over the will of the people.") Cf. The Federalist, No. 22 (A. Hamilton)("The fabric of American empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority.")(emphasis in original).

[77]See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803).

[78]See also discussion at pp. 61-64, infra.

D. Amendment 2 Preserves the Ability of the State to Remedy Discrimination Against Suspect Classes

The supporters of Amendment 2 were acutely aware that laws and policies designed to benefit homosexuals and bisexuals have an adverse effect on the ability of state and local governments to combat discrimination against suspect classes.[79] See An Analysis of 1992 Ballot Proposals, at 11. Amendment 2 is an appropriate means whereby the people sought to focus government's limited resources upon those circumstances most warranting attention.

The U.S. Supreme Court has recognized that remedying specific instances of racial or sexual discrimination is a compelling interest. Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983); Roberts v. United States Jaycees, 468 U.S. at 623. The State of Colorado, through entities such as the Colorado Civil Rights Division, has sought to further that interest through civil rights laws and enforcement programs. See, e.g., Parts 3, 4, 5, 6, 7, and 8 of Title 24, Article 34, C.R.S. However, owing to the fiscal constraints which are necessarily a part of public administration,[80] unlimited resources are not available for this purpose. Therefore, it is incumbent upon the State to set priorities for its enforcement efforts.

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[79]In its most expansive sense, these may be considered to include those persons whom Congress has determined warrant special protection, such as the physically disabled. See, e.g., Publ. Law 101-336, the "Americans With Disabilities Act of 1990," codified at 42 U.S.C. §§ 12101, et seq.

[80]Cf. Colo. Const. art. X, § 20 ("Amendment 1").

The reluctance to extend special protections to homosexuals and bisexuals is based in part upon the absence of a definitive showing that such protections are warranted. It is also based in part upon the sense that homosexual and bisexual orientation is an inappropriate basis for special protections because of it is at best morally ambivalent. Widespread respect for and willingness to abide by civil rights laws is undermined by imposing legal requirements which are not only unnecessary, but reinforce activities which the people regard as wrong.

Although Congress has made findings regarding the need to remedy discrimination against groups such as racial minorities, women, and the disabled, it has made no such findings as to homosexuals and bisexuals. Further, there is no compelling evidence from Colorado sources indicating that such discrimination is a severe problem locally. Although the Plaintiffs have proffered anecdotal testimony, such evidence is inadequate to support an inference of discrimination. Indeed, as noted earlier, homosexuals enjoy a preferred position in economic and educational achievements in this country.

The Plaintiffs' evidence regarding discrimination nationwide is similarly of questionable probity. Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989)("The probative value of these findings for demonstrating the existence of discrimination in Richmond is extremely limited.") The Plaintiffs cannot seriously maintain, on the basis of either anecdotal evidence or generalized national statistics that discrimination against homosexuals and

bisexuals is so severe in Denver, Boulder, and Aspen, or elsewhere, that special protections are necessary. Indeed, it seems unlikely that protections would be called for in those communities where homosexuals and bisexuals are a dominant force and wield the greatest political power. For this reason, as Justice O'Connor observed for the majority in Croson, "We have never approved the extrapolation of discrimination in one jurisdiction from the experience of another. See Milliken v. Bradley, 418 U.S. 717, 746 (1974)('Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system')." 488 U.S. at 505.

Quite simply, there is a very real difference between "the 'focused' goal of remedying 'wrongs worked by specific instances of racial discrimination' with 'the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past.'" Croson, 488 U.S. at 496-97 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 307 (1986)(plurality opinion)). Otherwise, our civil rights laws will become little more than a vehicle for any special interest group "with the political strength to negotiate 'a piece of the action' for its members." Croson, 488 U.S. at 511 (quoting Fullilove v. Klutznick, 448 U.S. 448, 539 (1980)(Stevens, J., dissenting).[81]

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[81]Cf. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989)(quoting University of California Regents v. Bakke, 438 U.S. 265, 296-97 (1978)(opinion of Powell, J.)("Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought

Furthermore, the question of homosexuality and bisexuality is deeply controversial and divisive. Unlike race and sex, there is no national consensus that sexual orientation is an inappropriate basis for governmental, much less private, decisionmaking. A series of constitutional amendments and Acts of Congress have authoritatively settled the place of these matters in American public life. E.g., Bob Jones Univ., 461 U.S. at 595. The same simply cannot be said of homosexuality and bisexuality. E.g., Mathews v. Lucas, 427 U.S. 495, 507 (1976)("discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.") Compare Califano v. Goldfarb, 430 U.S. 199 (1977)(striking down a scheme virtually identical to that upheld in Lucas, except that it involved discrimination based upon sex, rather than legitimacy).

Whatever else may be said, the Plaintiffs in this case quite simply stand apart, and upon a wholly separate footing from, persons traditionally accorded special protections. For the people of Colorado to simply recognize that fact, and to eschew this special interest group in favor of persons entitled to special protections by virtue of federal law, not only is appropriate, but constitutes a compelling interest.

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to exceed some arbitrary level of tolerability then would be entitled to preferential classifications . . . .")

E. Amendment 2 Prevents Government from Subsidizing the Political Objectives of a Special Interest Group

"[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his own his mind and his conscience rather than coerced by the State." Lyng v. International Union, 485 U.S. at 369 (quoting Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977)). The public is deeply divided over the issue of homosexuality; by adopting Amendment 2, the people have sought to ensure that government will not attempt to coerce, either explicitly or implicitly, a belief about the morality of homosexuality. Instead, Amendment 2 preserves for individuals the right to make their own judgments on this question, rather than permitting government to weigh in with its considerable influence and authority.[82]

"A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." Wooley v. Maynard, 430 U.S. 705, 714 (1977). Unlike matters of race and sex, as a society we have not authoritatively arrived at a consensus that homosexuality is an inappropriate basis for distinctions in public life, much less private life. Constitutional amendments and Acts of Congress have authoritatively settled the question of their place in our society. It is far from settled, however, that

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[82]Indeed, the evidence shows that the local ordinances have served, in some measure, to stifle legitimate disagreements and differences of opinion.

homosexuals and bisexuals are on the same footing, and such a view is a central component of a particular ideology and set of political beliefs. For example, if a landlord is forced to rent an apartment to a homosexual couple, the landlord is being forced to accept, at least implicitly, a particular ideology. Such compelled endorsement of a particular viewpoint is contrary to the core values of our society. It is clear that government may not enter the political marketplace by forcing private persons to subscribe to or advance particular political beliefs.

F. Amendment 2 Prevents Government From Interfering With Personal, Familial, and Religious Privacy

Amendment 2 is further justified by the compelling interest of protecting the sanctity of personal, familial, and religious privacy. Our state and federal constitutions explictly recognize the importance of religious liberty,[83] and the U.S. Supreme Court has recognized the importance of preserving spheres of personal liberty,[84] including a right of intimate association.[85] In truth, this compelling interest is nothing more than the individual liberty which this nation has cherished for over two centuries. At the heart of that individual liberty is the freedom to make

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[83]U.S. Const. amend. I, Colo. Const. art. II, § 10. See also Abington School Dist. v. Schempp, 374 U.S. 203, 222-23 (1963).

[84]See, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923).

[85]Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 544 (1987).

personal choices regarding with whom one wishes to associate, and how one wishes to be governed.[86]

The concerns surrounding religious liberty are quite obvious and substantial. Individual landlords or employers who have depp-seated and profound religious objections to homosexuality would nonetheless be compelled to compromise those convictions, under threat of government sanctions. See Donahue v. Fair Employment & Housing Comm'n, 2 Cal. Rptr.2d 32 (Cal. App. 2d Dist. 1991), review granted, (Cal. Feb. 7, 1992). In the name of "civil rights," such measures come perilously close to rendering the flight of the Pilgrims, and countless thousands after them, futile.

However, the oppressive nature of these ordinances is not limited to the coercion of individuals. In Aspen, for example, section 13-98 of the sexual orientation ordinance required churches to make their facilities open to homosexual organizations if they opened to any community organization. Moreover, churches apparently could not refuse to hire employees, and presumably pastors or priests, on the basis of their sexual orientation. Similarly, Title 12 of the Boulder municipal code made churches and religious organizations civilly liable for failure to hire or make facilities available to homosexuals and bisexuals.[87]

Another fundamental right affected by these ordinances is the ability of parents to pass on moral values to their children. See,

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[86]Indeed, the public debate surrounding Amendment 2 has much to do with government's involvement in these choices.

[87]In contrast, Denver's ordinance had a religious exemption.

e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944)("the rights . . . of parents to give them religious training and to encourage them in the practice of religious belief"). Indeed, the U.S. Supreme Court has expressly acknowledged that:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977). See also Wisconsin v. Yoder, 406 U.S. 205, 232 (1972)(parental role is "now established beyond debate as an enduring American tradition"); Ginsberg v. New York, 390 U.S. 629, 639 (1968)(parental role is the "basic structure of our society"); Griswold v. Connecticut, 381 U.S. 479, 496 (1965)(traditional family is as "fundamental as our entire civilization")(Goldberg, J., Warren, C.J., and Brennan, J., concurring); Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, 1200 (E.D. Va. 1975)("the Constitution condemns State legislation that trespasses . . . upon the sanctity of the home, or the nurture of family life.")

Without Amendment 2 there would be nothing to prevent the State or a local government from endorsing, at least implicitly, the view that homosexuality and hetereosexualty are morally equivalent. "[T]he State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of

its people." Zablocki v. Rehail, 434 U.S. 374, 399 (1978)(Powell, J., concurring).[88]

Such an implicit endorsement would undermine the traditional family in two ways. First, the implicit endorsement would severely undermine the efforts of some parents to teach a moral value. If a child hears one thing from his parents and the exact opposite message from the government, parental authority will inevitably be undermined. While some may think it desirable for children to find homosexuality acceptable, the Constitution "excludes any general power of the State to standardize its children . . . . " Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). Cf. A. Huxley, Brave New World (1925)(describing a society where the State bears sole responsibility for child rearing).

Second, an implicit endorsement, as opposed to mere tolerance, of homosexuality undermines the position of traditional families; any configuration becomes morally and socially equivalent. In a time when many of our social ills can be traced directly to the continuing breakdown of the traditional family, these concerns take on additional importance; indeed, the preservation of traditional families is compelling under the circumstances of this case.

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[88]The fact that Amendment 2 furthers these interests in a generalized fashion, by prohibiting government's endorsement of homosexuality and bisexuality, does not render it invalid; rather, it emphasizes how narrowly tailored the measure is. See Barnes v. Glen Theatre, Inc., 111 S. Ct. at 2468-69 (Souter, J., concurring)(State has a "substantial interest in combating the secondary effects of adult entertainment establishments," which "encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity.")

G. Amendment 2 Promotes the Physical and Psychological Well-Being of Our Children

The U.S. Supreme Court has strongly affirmed that the State has a compelling interest in promoting the welfare of its children. New York v. Ferber, 458 U.S. 747 (1982). See also People v. Enea, 665 P.2d 1026 (Colo. 1983). The State's interest in this area justifies limitations on other rights, including free speech, and the right of parents to raise their children as they see fit. Santosky v. Kramer, 455 U.S. 745, 766, 769 (1982).

Amendment 2 furthers these interests by preventing the State from promoting or giving special recognition to homosexuality or bisexuality as equivalent to heterosexuality or the traditional family structure. The State has an undeniable interest in protecting the morals of its children. See, e.g., Ginsberg v. New York, 390 U.S. 629, 636 (1968)(upholding statute restricting sale of sexually explicit materials to persons under 17 years of age). Cf. Barnes, 111 S. Ct. at 2461-62. Indeed, no one would argue with the State's responsibility to steer children towards healthy individual and societal lifestyles. After all, it has an obvious interest in its own stability and perpetuation, and it can choose to further that interest by protecting the preferred status of a stable heterosexual marriage.

Society has recognized heterosexual marriage as the foundation of a stable family unit. See, e.g., Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Indeed, as Justice Harlan noted:

> Yet the very inclusion of the category of morality among state concerns indicates that

> society is not limited in its objects only to the physical well-being of the community, but has tradititionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into our social life that any Constitutional doctrine in this area must build upon that basis.
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> * * *
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> Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.

Poe v. Ullman, 367 U.S. 497, 545-46, 553 (1961)(Harlan, J., dissenting from dismissal of appeal regarding statute prohibiting contraceptives for married couples).[89] The State has a compelling interest in supporting the traditional family because without it, our children are condemned to a higher incidence of social maladies such as substance abuse, poverty, violence, criminality, greater burdens upon government, and perpetuation of the underclass.

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[89]Significantly, Justice Harlan's opinion -- in which he would have found the statute unconstitutional -- foreshadowed the action the Court took just four years later in Griswold v. Connecticut, 381 U.S. 479 (1965).

Moreover, this refusal to endorse, and treat as a valid choice, a lifestyle which poses particular dangers to its adherents, as well as to society at large, aims to spare impressionable children from the painful and damaging effects described by the Plaintiffs' expert witness, Dr. Gonsiorek. As he testified at the injunction hearing, youths who identify themselves as homosexual are much more likely than other children to suffer various serious mental, emotional, and physical difficulties. They "feel inferior or second class [and] psychologically uncomfortable." v. 3, p. 83-85. Young people experimenting with homosexuality also face greater problems socially adjusting to their environment. Id. Homosexual youths, while constituting a small percentage of the population, account for 50% of suicide attempts, and about a third of successful suicides. (v. 5, p. 129). Moreover, as the evidence will show, homosexuals experience disproportionately greater morbidity and lesser longevity.

As the Plaintiffs have conceded, the factors that cause one to be a homosexual or bisexual are poorly understood. It appears though, even to the Plaintiffs, that there is a substantial environmental component to the formation of homosexual tendencies. See discussion at p. 14, infra. Amendment 2 helps to avert unnecessary suffering for those who may be influenced relative to their sexual preference by not lending government's voice to the debate. The State's interest in this regard can hardly be questioned.

H. Taken Together, These Interests Constitute a Compelling Interest Which Validates Amendment 2

Each of the foregoing interests are adequate to validate Amendment 2. They are especially so, when considered in the aggregate. Cf. Employment Div. v. Smith, 494 U.S. 872, 881-82 (1990)(application of even a neutral and generally applicable law can be barred by "hybrid" constitutional interests such as a free exercise claim reinforced by some other constitutional concern).

VIII. AMENDMENT 2 IS NARROWLY TAILORED

"Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." Wygant, 476 U.S. at 280 (citing Fullilove v. Klutznick, 448 U.S. at 480 (opinion of Burger, C.J.)) See also id. at 280 n.6.[90]

Amendment 2 is narrowly tailored, to varying degrees, with respect to each of the compelling interests which it furthers. It is narrowly tailored for two basic reasons. First, rather than a broad measure imposing special burdens upon homosexual and bisexuals, it denies protections solely on the basis upon which

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[90]It is important to note that at least four Justices of the U.S. Supreme Court have taken the view that "in cases like this and Storer [v. Brown], we have never required that States meet some kind of 'narrowly tailored' standard in order to pass constitutional muster." Anderson v. Celebreeze, 460 U.S. at 817 (Rehnquist, White, Powell, and O'Connor, JJ., dissenting).

they have been sought.[91] Amendment 2 does not in any way restrict the right to vote; it creates no special burdens with respect to the right to petition; it does not interpose any hurdles to homosexuals and bisexuals seeking to amend the state constitution that no one else has. In fact, homosexuals and bisexuals have no greater burden in overturning Amendment 2 than its proponents had to bear in enacting it. This is an exceptionally narrowly tailored measure.

Second, Amendment 2 itself imposes an exceptionally minor burden upon the "right" to participate equally in the political process. In fact, there is absolutely no other way that the people could further the common elements of the various compelling interests, but through the enactment of Amendment 2. Far from impermissibly interposing government into the question, Amendment 2 seeks to remove government from this terribly divisive issue until such time as popular consensus emerges. Indeed, rather than "'fencing out' an independently identifiable class of persons," 854 P.2d at 1282, Amendment 2 seeks to "fence out" government. It is difficult to imagine a measure more narrowly tailored to achieve the compelling interests present. This is particularly applicable here, because the homosexual rights question is uniquely positioned at the intersection of all of these compelling interests.

The desire of homosexuals and bisexuals to seek beneficial legislation at the local level must give way to society's right to

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[91]For example, Amendment 2 is far less restrictive than the absolute bar approved by the U.S. Supreme Court in Storer v. Brown, 415 U.S. 724 (1974)(one-year disaffiliation requirement).

resolve divisive, value-laden social questions at the highest political level. This is, after all, the purpose of constitutions: to encompass judgments about the scope and power of government. Although they need not be permanent, such judgments, by their very nature, must not be easily displaced or circumvented. These judgments are so fundamental that they can only be displaced by the people themselves after a thorough public debate.

The common thread underlying each of these interests is the fabric of American society as we know it. Although it is true that our society has changed over the past two centuries, and that many of those changes have been salient, nonetheless, it is for the people -- through the political branches of their government -- to determine what those changes shall be, and when those changes shall occur.

CONCLUSION

For the foregoing reasons, based upon the authorities cited, the Defendants respectfully request that this court enter judgment in their favor as to all of the Plaintiffs' claims.

Respectfully submitted this 12th day of October, 1993.

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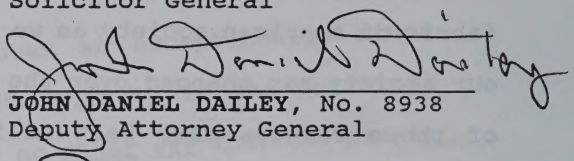

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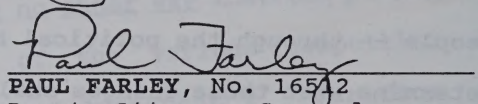

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sequently approve a mill levy increase to make up the lost revenue, the exemption of business personal property from taxation will shift the tax burden to those businesses that are not able to take advantage of such exemptions. Given the current structure of school finance, the resulting loss of school district property tax revenue will increase the burden on state resources.

AMENDMENT 2 — CONSTITUTIONAL AMENDMENT INITIATED BY PETITION

No Protected Status

Ballot Title: *An amendment to Article II of the Colorado Constitution to prohibit the state of Colorado and any of its political subdivisions from adopting or enforcing any law or policy which provides that homosexual, lesbian, or bisexual orientation, conduct, or relationships constitutes or entitles a person to claim any minority or protected status, quota preferences, or discrimination.* *

Provisions of the Proposed Constitutional Amendment

The proposed amendment to the Colorado Constitution would:

— prohibit the state, its branches or departments, or any of its agencies, political subdivisions, municipalities, and school districts from adopting or enforcing any law or policy that entitles any person to claim discrimination, protected status, minority status, or quota preferences based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships; and

— make all existing anti-discrimination ordinances, laws, regulations, and policies prohibiting discrimination based on an individual's homosexual, lesbian, or bisexual orientation unenforceable and unconstitutional.

Definitions

For the purposes of this analysis, the following terms have the given meanings:

— **"Civil rights laws"** refers to local, state, and federal laws designed to protect classes of persons from discrimination in areas such as employment, housing, and public accommodations.

— **"Constitutional rights"** refers to the guarantees contained in the federal Bill of Rights (first ten amendments to the United States Constitution) and made applicable to the states through the Fourteenth Amendment.

— **"Discrimination"** as commonly used in civil rights law, means any act which denies, prevents, or limits any person from obtaining or maintaining employment, housing, or public accommodations based on race, age, gender, disability, nationality, or religion. Some states and localities have extended similar protections against discrimination based on factors such as marital or familial status, military status, sexual orientation, or political affiliation.

— **"Equal protection"** refers to the clause in the Fourteenth Amendment to the United States Constitution which prohibits any state from adopting any law which denies the equal protection of the laws guaranteed to the citizens of the United States.

— **"Political subdivision"** generally refers to a county, municipality, school district, local junior college district, special district, water conservation district, cooperative agency, regional commission, or an Indian tribe organized pursuant to the federal "Indian Reorganization Act of 1934," as amended.

— **"Protected status"** means that a group has been identified for protection from actions which affect a protected or suspect class and which are limited or scrutinized as required by anti-discrimination statutes, ordinances, or common law.

— **"Quota"** refers to a remedy which imposes numerical goals to correct past discriminatory employment practices.

— **"Sexual orientation"** means the status of an individual as to his or her sexuality, for example, heterosexuality, homosexuality, lesbianism, or bisexuality.

Background

The proposed amendment arises in the context of three decades of increased governmental activity in the area of civil rights. The concepts of the federal Civil Rights Act of 1964 have been extended by Congress, the states, and local governments which have enacted new laws and strengthened existing laws to prohibit discrimination in employment, housing, access to public accommodations, and other areas involving civil rights. Courts at all levels are involved in interpreting and applying these laws, and administrative agencies have been created to enforce some of them. The proposed amendment identifies one area — discrimination based on homosexual, lesbian, or bisexual orientation, conduct, practices, or relationships — in which civil rights laws and policies could **not** be enacted or enforced by the state government or by local governments in Colorado.

Evidence of discrimination. There is disagreement concerning the extent of discrimination against homosexuals, lesbians, and bisexual persons. Discussions with public agencies which maintain records on such discrimination complaints reveal that these individuals have been found to experience discrimination in access to employment, housing, military service, commercial space, public accommodations, health care, and educational facilities on college campuses. For example, of the 50 complaints reported to the Denver Agency for Human Rights and Community Relations in 1991, twenty-three were incidents of discrimination based on sexual orientation. Approximately 61 percent of these reports dealt with employment discrimination. Since 1988, the Boulder Office of Human Rights has investigated ten incidents of discrimination based on sexual orientation. Four of the

complaints lacked sufficient evidence to be considered discrimination based on sexual orientation. It is generally recognized that discrimination complaints often go unreported because individuals fear the repercussions and further victimization associated with disclosure of their sexual orientation.

Current Laws and Policies

Presently, a patchwork of federal, state, and local laws, regulations, and policies are in effect which monitor, offer limited protection against, or prohibit discrimination based on sexual orientation.

Local ordinances. Three home rule cities – Aspen, Boulder, and Denver – have ordinances protecting individuals from job, housing, and public accommodations discrimination when that discrimination is based solely on sexual orientation. None of the ordinances requires quotas, affirmative action, minority status or requires that employers or landlords seek out homosexual, lesbian, or bisexual employees or tenants. These cities have determined that discrimination based on sexual orientation was a sufficient problem to warrant protections against discrimination in the areas of employment, housing, and public accommodations.

Aspen's ordinance prohibits discrimination in the areas of employment, housing, and public accommodations because of race, creed, color, religion, ancestry, national origin, sex, age, marital or familial status, physical handicap, sexual orientation, or political affiliation. The Aspen ordinance does not exempt religious institutions. In Boulder, religious institutions cannot refuse to hire an individual or restrict access to public accommodations or housing because of that person's race, creed, color, gender, sexual orientation, marital or familial status, pregnancy, national origin, ancestry, age, or mental or physical disability. The Denver ordinance entirely exempts religious institutions, thus allowing them to refuse to hire persons or restrict access to public accommodations or housing based on a person's sexual orientation.

In Boulder, the owner of an owner-occupied, one-family dwelling or duplex is not permitted to deny housing to an individual based on his or her sexual orientation. However, the ordinance does allow owners to limit renters or lessees to persons of the same sex. In Denver, owners with rental spaces in their homes or duplexes (in which they reside) are exempted from the ordinance.

The anti-discrimination laws in these three cities do not classify homosexual, lesbian, or bisexual persons as ethnic minorities, but instead outlaw discrimination based on sexual orientation. These laws banning discrimination based on sexual orientation also prohibit discrimination against heterosexual individuals as well as against homosexual, lesbian, and bisexual persons. Attempts to pass similar anti-discrimination ordinances based on sexual orientation were defeated in Colorado Springs and Fort Collins. In addition, Denver Public Schools has adopted a nondiscrimination policy prohibiting discrimination based on sexual orientation.

State laws and policies. In 1990, the Governor issued an executive order prohibiting discrimination based on sexual orientation in the hiring, promotion, and firing of classified and exempt state employees. The order applies to executive departments and to state institutions of higher education. Metropolitan State College of Denver has a policy prohibiting college sponsored social clubs from discriminating in membership on the basis of sexual orientation. Colorado State University has a general nondiscrimination policy prohibiting discrimination based on sexual orientation. Conversely, the University of Colorado Board of Regents defeated a resolution prohibiting discriminatory practices based upon sexual orientation. The only Colorado statute offering protection based on sexual orientation prohibits health insurance companies from determining insurability based on an individual's sexual orientation. Legislation was defeated in 1991 which would have expanded Colorado's ethnic intimidation law to include the right of every person, regardless of age, handicapping condition or disability, or sexual orientation, to be protected from harassment. Recently, the Colorado Civil Rights Commission voted to recommend that the state's civil rights law be amended to prohibit discrimination based on sexual orientation.

Federal laws. There are no federal civil rights laws that protect persons from discrimination based on sexual orientation in the areas of housing, employment, or public accommodations. However, the federal Hate Crime Statistics Act of 1990 requires the United States Attorney General to monitor, in addition to other crimes, those crimes that manifest evidence of prejudice based on sexual orientation.

Laws and policies in other states, municipalities, and higher education institutions. Anti-discrimination laws and policies based on sexual orientation are not unique to Colorado. Six states (Connecticut, Hawaii, Massachusetts, New Jersey, Vermont, Wisconsin) and the District of Columbia, and approximately 110 cities and counties in 25 states have passed legislation protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation in employment, housing, and public accommodations. In contrast, the voters in Oregon will be considering an initiated measure, which among other provisions, would outlaw legislation aimed at protecting homosexual, lesbian, and bisexual persons from discrimination based on sexual orientation. In 1988, the voters in Oregon overturned an executive order that would have protected homosexual individuals from discrimination in state government.

Governors of eight states besides Colorado (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington) have issued executive orders prohibiting discrimination in state employment based on sexual orientation. Nationally, around 65 college and university systems have issued non-discrimination statements protecting heterosexual, homosexual, lesbian, and bisexual persons.

Impact of the Proposal

Passage of the amendment would make unenforceable and unconstitutional those ordinances which prohibit discrimination based on sexual orientation with regard to homosexual, lesbian, and bisexual persons. Therefore,

the portion of those ordinances prohibiting discrimination based on sexual orientation adopted by the city council or approved by the voters in the cities of Aspen, Boulder, and Denver would be rendered invalid. In addition, the amendment would nullify existing anti-discrimination policies based on sexual orientation which have been adopted by any state branch of government, department, agency, or school district in Colorado and would prevent adoption of any state statute, local ordinance, or policy for public entities which prohibits discrimination based on sexual orientation. The amendment would not affect the anti-discrimination policies based on sexual orientation that have been adopted by numerous private employers. However, the amendment does not address the rights of heterosexual individuals to bring claims of discrimination under existing or future ordinances, therefore the impact of the amendment on the rights of heterosexuals is not known.

Arguments For

1) There is no evidence that homosexual, lesbian, and bisexual individuals are sufficiently disadvantaged to warrant designation as a protected class. Protected class status is not a basic right guaranteed to all citizens by the United States Constitution. In general, protected class status has been afforded to groups which have historically been subjected to purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process, or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Some groups which have been given protection are those identified because of national origin, culture, age, disability, gender, religion, and marital or familial status. Similarly, there are no organized, state-sanctioned legal barriers which deny their ability to participate in the political process as has been the situation faced by racial minorities, in particular. For these reasons, it appears that this amendment may pass constitutional muster.

2) Homosexual, lesbian, and bisexual persons do not require protected status because they are entitled to recourse under the tort laws for libelous or slanderous abuse, wrongful discharge, emotional distress, or similar theories. Since homosexual, lesbian, and bisexual persons cross all cultural lines they may already receive protections with regard to race, gender, age, ethnicity, disability, religion, or marital or familial status. Insufficient evidence exists for creating a legal cause of action by homosexual, lesbian, and bisexual individuals in employment, housing, and public accommodations to warrant adding sexual orientation as a protected class.

3) Granting protected status to homosexual, lesbian, and bisexual persons may compel some individuals to violate their private consciences or to face legal sanctions for failure to comply. For some individuals, homosexuality, or bisexuality conflicts with their religious values and teachings or their private moral values. If a landlord is required to rent an apartment, for example, to homosexual, lesbian, or bisexual persons, he or she may be asked to either condone a lifestyle of which they do not approve or to be in violation of a local ordinance. People and institutions should have the right to express and act upon their moral convictions without being accused of discrimination.

4) The amendment does not have a negative impact on home rule autonomy of Colorado cities nor does it intrude into traditional powers of local government. The Colorado Constitution guarantees local municipalities the ability to function legislatively only in municipal affairs. Civil rights issues are not normally considered by local governments. Because of the importance of these issues, a wider spectrum of individuals than just municipalities should consider these matters. Consideration of individual and group civil rights on the municipal level sets an improper precedent and only serves to dilute the original purpose of legislation enacting civil rights protections.

5) A proliferation of local ordinances or the possibility of a state statute that would provide protected status for homosexual, lesbian, and bisexual persons may divert resources for current enforcement activities. Additional discrimination cases may produce a demand for more staff and other state and local resources to investigate complaints, resolve disputes, or litigate cases.

Arguments Against

1) All individuals should be accorded the same basic dignity, right to privacy, privileges, and protections guaranteed to every citizen. Discrimination against any class of individuals is wrong and, if tolerated, can easily spread to any and all groups in our society. In a pluralistic society, a threat to the rights of any one group should be viewed as a threat to the rights of all citizens. The amendment deprives homosexual, lesbian, and bisexual persons of legal protection against discrimination based on sexual orientation by isolating them as a class which could not be protected by such civil rights laws. Civil rights laws are constantly evolving to meet the demands of society, and no group of people should be precluded from seeking civil rights protection or protection from discrimination. Civil rights laws prohibiting discrimination against homosexual, lesbian, and bisexual persons do not condone or encourage homosexuality or bisexuality; rather, they only condemn discrimination of any nature and ensure equal opportunity for every citizen. By eliminating legal protections, the amendment sanctions prejudicial acts against homosexual, lesbian, and bisexual persons.

2) Because homosexual, lesbian, and bisexual persons face discrimination in employment, housing, and public accommodations and are victims of hate crimes, civil rights laws are needed that prohibit discrimination based on sexual orientation. Without the ordinances, existing laws inadequately protect these individuals and fail to address discrimination in employment, housing, and public accommodations. Homosexual, lesbian, and bisexual individuals belong to all economic classes and are members of all racial, ethnic, disability, age, and religious communities. Because the kind of discrimination that these individuals experience is solely connected

to a person's sexual orientation, the added protection in the ordinances gives homosexual, lesbian, and bisexual individuals legal recourse should they be discriminated against on the basis of their sexual orientation.

3) The amendment attacks home rule autonomy and intrudes into the traditional powers of local governments and political subdivisions with respect to civil rights. Two-thirds of all Coloradans live in home rule cities. Under the Colorado Constitution home rule cities are empowered to address the needs of their residents as they see fit. This amendment also undermines county powers and the ability of the executive branch of government, school districts, and political subdivisions to enact their own anti-discrimination policies on this issue. The amendment implies that governmental entities, including the state, counties, cities, school districts, and other political subdivisions, should not be trusted to decide whether or not to protect persons from discrimination based on sexual orientation.

4) Ensuring the civil rights of any person, whether for age, gender, race, disability, religion, sexual orientation, marital or familial status, does no more than protect persons from discrimination and guarantee their basic human rights. The amendment is misleading and prejudicial by implying that homosexual, lesbian, and bisexual persons are seeking "minority status" or "quota preferences." Instead, the current local ordinances protect the right to get a job, buy a house, or have the same access to public accommodations as every other citizen. Each of these local ordinances also bans discrimination on the basis of age, gender, disability, religion, and marital or familial status, which are factors that are unrelated to whether a person is a member of a racial or ethnic group.

5) By singling out homosexual, lesbian, and bisexual persons in the state constitution and effectively denying them potential remedies for discrimination, the amendment denies them the same equal protections under the United States Constitution as other citizens. The proposed amendment may violate the equal protection clause of the United States Constitution, which prohibits any state from adopting a law which singles out a group for unfavorable or discriminatory treatment without a sufficient basis, or due to prejudice or irrational fears. For example, those city ordinances barring discrimination on the basis of sexual orientation could still be applicable to heterosexual individuals bringing claims of discrimination based on sexual orientation in housing, employment, and public accommodations, but not to homosexual, lesbian, and bisexual persons. Arbitrarily discriminating against any class of individuals in employment decisions based on sexual orientation is a violation of equal protection laws. Further, it is also a violation for a state to adopt a constitutional amendment which arbitrarily discriminates against homosexuals.

INTRODUCTORY COMMENTS – LIMITED GAMING
(Applicable to Amendments 3, 4, 5, and 9)

General Background

The Colorado Constitution, as adopted in 1876, prohibited gambling. Over the years, certain forms of gambling have been legalized by the General Assembly and the voters. These forms include pari-mutuel betting, games of chance (bingo and raffles), and lottery.

Limited Stakes Gambling in Colorado

Legalization of limited stakes gambling. In 1990, Colorado voters approved a constitutional amendment permitting limited stakes gaming in the commercial districts of Central City, Black Hawk, and Cripple Creek. "Limited gaming" is defined as the use of slot machines and the card games of blackjack and poker, each game having a single maximum bet of $5.00. In the 1990 amendment, limited gaming (hereinafter termed limited gambling) is restricted to buildings which conform to the architectural styles and designs common to the areas between 1875 and World War I. Limited gambling is further restricted in that no more than 35 percent of the square footage of any building and no more than 50 percent of any floor may be used for limited gambling purposes.

Most recently, the Ute Mountain Ute and the Southern Ute tribes of Colorado have obtained approval under federal law to operate casinos on reservation lands. The Ute Mountain Ute tribe has built a casino which may operate 24 hours a day. The casino will offer keno in addition to poker, blackjack, and slot machines, each with a maximum single bet of $5.00. The Ute Mountain Utes will pay no state gambling taxes because tribal sovereignty supersedes state law. The Southern Utes are currently in the process of establishing a casino.

Limited Gaming Control Commission. Limited stakes gambling is administered by the Limited Gaming Control Commission (Commission), which consists of five members appointed by the Governor and approved by a two-thirds majority of the Colorado Senate. Pursuant to the 1990 amendment, the Commission is responsible for administering gambling, creating rules and regulations, issuing licenses for gambling establishments, and determining the tax rate on gambling revenues.

Tax rate on gambling revenues. The constitutional amendment which legalizes limited gambling requires that a state tax of up to 40 percent of the adjusted gross proceeds of limited gambling (wagers minus payouts to players) be paid by each licensed gambling establishment for the privilege of conducting limited gambling. The constitution then authorizes the Commission to establish the tax percentage.

In August of 1991, the Commission established a graduated tax rate on adjusted gross proceeds (AGP) of limited gambling. The first $440,000 in AGP is taxed at 4 percent; the AGP between $440,000 and $1.2 million is taxed at 8 percent; and any amount over $1.2 million is taxed at 15 percent.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within TRIAL BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado, this 12th day of October, 1993, addressed as follows:

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